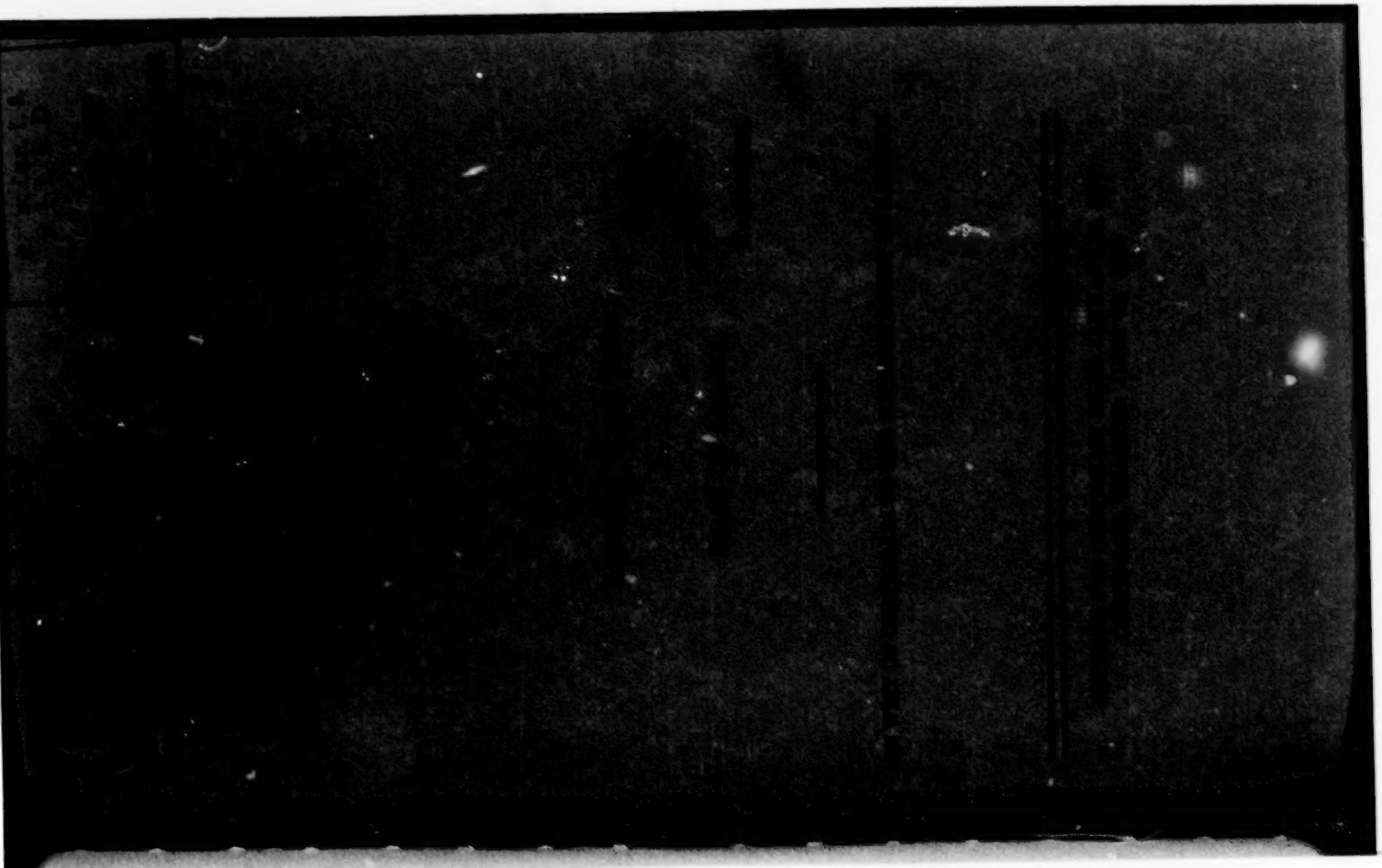

# Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-6060**

ANTHONY LOUIS TACON,

*Petitioner,*

—v.—

STATE OF ARIZONA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 31, 1970—Pre-trial in camera hearing regarding absence of petitioner.

March 31, 1970—Court's order that trial proceed in absence of petitioner.

March 31, 1970—Jury trial of action commenced.

April 1, 1970—Petitioner's motion to stay termination of trial pending petitioner's arrival to testify.

April 1, 1970—Petitioner's motion to stay termination of trial denied.

April 1, 1970—Verdict of jury finding petitioner guilty as charged.

April 1, 1970—Judgment entered sustaining jury verdict.

May 4, 1970—Hearing on contempt charges stemming from petitioner's absence at trial (no disposition).

September 23, 1971—Judgment and opinion of Supreme Court of Arizona filed, affirming judgment of trial court.

October 27, 1971—Order of Supreme Court of Arizona denying petitioner's motion for rehearing.

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF COCHISE**

No. 7406

STATE OF ARIZONA, PLAINTIFF

—*vs*—

ANTHONY LOUIS TACON, DEFENDANT

TRIAL PROCEEDINGS OF MARCH 31 AND APRIL 1, 1970

IN CAMERA PRE-TRIAL HEARING ON ABSENCE OF PETITIONER

* * * *

[fol. 3] THE COURT: Were you present at the trial setting on March 2nd when the matter was set for this particular day?

MR. WHITNEY (Petitioner's Court Appointed Trial Counsel): I don't know whether I was present or not, Judge. I was aware that the trial would be set on March 31st.

THE COURT: The attorney for the defendant was either present at such trial setting or was immediately advised thereof; and on March 23, 1970, the county attorney having been advised that there was a possibility, according to the information he had received, that the defendant might not appear for trial, and for the further reason that the county attorney intended to procure the attendance of a prisoner retained in a reformatory in the State of Oklahoma as a witness in the matter, at some cost to the State of Arizona, and that he did not desire to secure such attendance unless there was some assurance that the matter would go to trial; and that it further appearing that the defendant had been released to the custody of his commanding officer at Fort [fol. 4] Huachuca without the requirement of a bond, and with the understanding that the defendant would remain in the custody of such commanding officer, but that such defendant had been released from the army, or from military service and left the military establishment at Fort Huachuca without notification to the county

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attorney, the Court, or the attorney for the defendant the Court at that time ordered that a bench warrant issue for the arrest of the defendant for the purpose of assuring his presence at the trial.

The attorney for the defendant was notified of these proceedings and the Court discussed the matter with the attorney for the defendant, Mr. James D. Whitney, indicating to Mr. Whitney that unless good cause to the contrary were to be shown it would be the finding of the Court that the absence of the defendant at the time of trial, at the time set for trial, would be voluntary and that the trial would proceed in the absence of the defendant in accordance with the statute in such cases made and provided.

That the attorney for the defendant was personally [fol. 5] advised of the proceedings on March 23, 1970 in addition to having been mailed a copy of the minute entry covering said proceedings.

The Court is informed that Mr. Whitney did attempt on various occasions to advise the defendant of the foregoing and of the trial setting by letter, and further, that the attorney for the defendant communicated with the defendant personally by telephone prior to these proceedings of the date of the trial without receiving assurance from the defendant that he would be present.

Now Mr. Whitney, can you amplify the statement of the Court as to your participation in efforts to advise the defendant of the trial setting.

* * * *

[fol. 6] MR. WHITNEY: If it please the Court, before I go into that further, the Court did make a record as to my not being notified of his separation, I mean by that, the defendant's separation from the service.

I did receive a telephone call on December 11 from the defendant indicating that—that would be December 11 of 1969—indicating that he would be separated from the service, at which time I was furnished an address in New York City, New York, at which I could inform the defendant of any proceedings that were going to take place in the future.

I received the notification of trial setting on March the 6th, 1970. I believe I had communicated with the Court prior to that date and been advised that the trial setting would take place on March the 31st. Now I think the communication took place on March 2nd or March 3rd. On March 3rd.

I wrote a letter to the defendant at the address fur- [fol. 7] nished me by him on or about December the 11th and indicated to him that the trial was set for March 31, 1970. I asked him in that letter to please make arrangements to be in Bisbee at least one week prior to the trial setting so that we might confer and make preparations for the trial.

I also requested in that letter that he communicate with me at his earliest possible convenience, and further stated that it was my belief that the case would not be postponed under any circumstances.

On March the 18th, having received no communication from the defendant, I wrote him a second letter, again at the same address in New York City, New York. I indicated at that time that I had received no response to my letter of March 3rd and indicated to him that I wish—that I wanted him to contact me since it might be possible to enter a plea of guilty to a reduced charge of possession of marijuana; and also there was the possibility that that reduced charge might be treated as a misdemeanor. I made no statement that it would be treated as a misdemeanor.

I'd state now at this point that both the March 3rd [fol. 8] and March 18th letters—

THE COURT: 13th, wasn't it?

MR. WHITNEY: No. March 18.

THE COURT: All right.

MR. WHITNEY: —letters bore the proper postage; that they were deposited in—to the best of my knowledge—the Warren Branch of the Bisbee Post Office. Neither of those letters has been returned, and I assume that they were received.

I received the—excuse me. I received notification of the proceedings that took place on March 23, 1970, when the Court stated that the trial would proceed unless good

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cause were shown that the absence of the defendant was not voluntary, received notification of that on March 24th. On that date I instructed my secretary, Mrs. Olander, to send a telegram to the defendant, again at the address furnished to me by him, on December the 11th, 1969, and in the telegram I stated as follows: "Judge will proceed with trial March 31, 1970 whether you are present or not. Contact me immediately."

On March 30, 1970 at approximately 10:40 A.M. I received a telephone call from the defendant. He didn't [fol. 9] state where he was. Again I indicated to him at this date that the Court would proceed with the trial, either with him being present or not present. He indicated to me at that time that he would attempt to get to Bisbee on this date, March 31, to attend the trial, but that he was short of funds and at the time he spoke to me didn't have sufficient money for transportation.

That's all I have, Your Honor, unless the Court has questions.

THE COURT: Was there indication by the defendant whether he had or had not received the prior communications, that is, the two letters and the telegram, at the time of your discussion of the matter with him on the telephone yesterday, March 30th?

MR. WHITNEY: Your Honor, explicitly, no. In other words, we didn't go into that question as such. I urged him, told him that he had to be here; that my chances, if any, of successfully defending this action, or even entering a plea of guilty to a reduced charge, were extremely slight so long as he wasn't here.

He said that he had attempted to contact me over the weekend but that there was a recording on the telephone [fol. 10] that something was wrong with my line.

In other words, let me say this; I was principally concerned at that time with urging him to make every possible effort to be here today.

THE COURT: Do you have anything, Mr. Skaggs?

MR. SKAGGS (County prosecutor): I cannot think of anything, Your Honor.

THE COURT: Very well. Let the record show that it is presently 9:34 of March 31, 1970, and the Court

will ask counsel to ascertain by checking with his office and further checking the court house area for the purpose of determining whether or not the defendant is present and the Court advises that if counsel desires he can have the assistance of the bailiff in so doing, and you will then notify the Court of your findings and then we will make an order after such determination.

(recess)

THE COURT: It was reported that Mr. Whitney was unable to locate the defendant and it is the order of the Court, based on the foregoing matter, that the matter proceed to trial in the absence of the defendant.

ORAL MOTION FOR CONTINUANCE TO STAY COMPLETION OF TRIAL

* * * *

[fol. 159] MR. WHITNEY: I would like to move the Court at this time to continue this matter until one day morning—strike that. Until tomorrow morning, tomorrow being Thursday, April 2nd, for the purposes of presenting the testimony of the defendant. This motion is based on the representation of the attorney in Floria, Mr. Levy, that the defendant could be present in court tomorrow morning, Thursday, April 2nd.

THE COURT: And on what basis do you move for a continuance?

MR. WHITNEY: Well, Your Honor, the motion is based—this is a criminal matter; this is a crime punishable by life imprisonment, and the defendant, of course, will be prejudiced by his failure to be present and to offer testimony, particularly concerning the transactions alleged to have taken place with Mr. Kleweno; and also the question of the voluntariness of the confession that was introduced in evidence yesterday.

THE COURT: Mr. Skaggs?

MR. SKAGGS: Well, the state will oppose the motion [fol. 160] to continue on the grounds that the record already discloses that the attorney for the defendant has attempted notification of the defendant on two or three

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different occasions; that he has been in contact with the defendant's mother before and that—

THE COURT: And with the defendant.

MR. SKAGGS: And with the defendant.—and that defendant was well aware of when the trial was set, when he had to be here and that he, for one reason or another, did not appear and is now asking for a day's continuance so that he can apparently now arrive, although we have no word from the defendant that he has any intention of returning. All we have is the representation of an attorney in Miami, Florida, that he can be here. We do not know at this point whether he would be able to arrive even if the motion to continue was granted. That if the motion to continue was granted it would be the state's assumption that were the defendant, Tacon, would be placed on the witness stand, and the state has, or would like the opportunity, if such a thing was to occur, in all probability to call the witness, Kleweno, to the stand in rebuttal, and at this point the state does not know whether or not it is possible to con- [fol. 161] tact the federal officers in that they are traveling by automobile between here and Oklahoma. We don't know whether we can find them and have the witness back for rebuttal purposes. Assuming we could find them there will be, certainly, additional expense to the county for doing it, and that expense would be incurred by the county even if the defendant, Tacon, did not show up tomorrow morning as represented by the Miami attorney, and as long as the defendant was notified of the trial date and has had plenty of opportunity to come, it seems to the state that it is a little late at this point to be asking for a continuance so that his presence can be had here before the Court. On those grounds the state will object to the motion to continue.

THE COURT: Mr. Whitney.

MR. WHITNEY: Well, nothing, Your Honor, other than the grounds that I have stated.

THE COURT: Well, it is the feeling of the Court that the jury, Court, and counsel, have been more than sufficiently imposed upon by the defendant; that the defendant has been afforded representation at county ex-

pense; has been given consideration heretofore in con-
[fol. 162] tinuances, that more than sufficient time to inform the Court of his ability or inability to be present for good and sufficient reasons has been afforded the defendant; it is still the opinion of the Court that the failure of the defendant to appear was voluntary; that apparently the present situation was provoked by the interest of the mother of the defendant in the situation and not that of the adult defendant; that the Court does not see sufficient reasons for granting the continuance based on the status of the case, the situations as heretofore revealed in these proceedings, and for those reasons the motion for a continuance is denied.

* * * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

No. 7406

STATE OF ARIZONA, PLAINTIFF

—*vs*—

ANTHONY LOUIS TACON, DEFENDANT

CONTEMPT HEARING OF MAY 4, 1970

TESTIMONY OF PETITIONER, ANTHONY LOUIS TACON—
DIRECT EXAMINATION BY MR. HIRSH

* * * *

[fol. 5] Q Now, you were arraigned, as I understand it, sometime—that is, you entered a plea of not guilty before the Court sometime in 1969; is that right?
[fol. 6] A Yes.

Q And you were connected—were you in the military service stationed at Fort Huachuca at that time?

A Yes, I was.

Q And it is my understanding that sometime after your arraignment before this Court that you were discharged from the military; is that right?

A Yes, I was.

Q Were you aware of the fact that you were released to your company commander when you were—after your arrest here in Cochise County for the charge that you are going to be tried on?

A Yes. My wife went and spoke to my—my CO, my commanding officer, and he had it arranged to speak to the district attorney over here to have me released under his custody.

Q And you were released and you went back to Fort Huachuca; is that right?

A Yes.

Q When were you discharged from the service?

A December 13, 1969.

Q And did you call your lawyer at that time?
[fol. 7] A As soon as—the same day that I was released I called Mr. Whitney and I told him that I was discharged from the service; and what was going to happen; he said, well, nothing is now, as I can see; but I told him that I would give him my forwarding address, and I gave it to him, and I gave him a phone number in case contact had to be made in a faster way, I gave him all the information possible.

Q And Mr. Whitney was your lawyer here in Cochise County; is that right?

A Yes, he was.

Q And you told Mr. Whitney that your address was 503 West 172nd Street, Apartment 12A, in New York?

A Yes. That was my mother-in-law's apartment. When I was—when I was drafted into the army, I wasn't living with my mother and father, I lived by myself. I lived in a small room. When I got drafted, of course, I gave up—my wife lived—she wasn't my wife then—lived with her mother, so when I returned, that was the only address that I could give where I knew I could be reached.

Q Did you leave for New York at that time after you gave Mr. Whitney your address and told him where [fol. 8] you could be contacted?

A Yes. I left the following day.

Q All right. And did you at that time not intend or intend not to come back to Cochise County, to Bisbee?

A No, no, because if that was true, I mean, I gave him the address and the phone, because I knew I had to go back, and I also called—made another call, and this particular person told me that if—if—

THE COURT: Who was the person?

A It was the commissioner of Nogales.

Q (BY MR. HIRSH) That was Albert Reyes?

A Yes.

Q Did he have charges, federal charges pending against you at the same time?

A Yes, I did.

Q And did you have an attorney that was representing you, defending you?

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A Yes. I called him also, and if you took the time, if possible, it could be verified, that I called him, and—and the commissioner of Nogales, Commissioner Reyes.

Q And was the lawyer that you called in Nogales, was his name Harley Morris of Nogales, Arizona?

[fol. 9] A Yes, it was.

Q And were you ever told by either Mr. Morris or Mr. Reyes, or Mr. Whitney, that you should not go to New York, not to go?

A No.

Q Were you ever instructed by any of those persons that you would be in violation of any court order, violating any law at all by going to New York?

A No.

Q Did you know any reason why you shouldn't go back to New York at that time?

A Why I shouldn't go back?

Q Yes. Were you aware of any reason why you shouldn't?

A No. After I made these calls, and Mr. Reyes told me, I grant you permission to leave the state, and I called Mr. Whitney, and also my other lawyer, Mr. Harley, though since I had my discharge, I wasn't in the wrong to return home to see my—where my wife was, and family.

Q How much education do you have, Tony?

A Eleven and a half years, high school.

Q And what kind of work had you done, were you doing, before the service?

A Well, I've had numerous amounts of part-time [fol. 10] jobs, but I was—the first job I had that I liked, and was working at, was I was working as an assistant buyer trainee, Macey's Department Store, New York, and I worked there for a period of approximately nine months, and then I took a school called Fashion Institute of Technology, and I took a couple of courses there, retail math, and fashion buying, merchandising, and during this course I felt less interested in it, I dropped out of that school, and then I obtained a job working for Columbia University as an assistant lab technician.

Q I am not asking you for a biographical run-down, Tony; I just want you to give the Court some idea of the sort of work you were doing so that—

A Assistant lab technician would be sufficient.

THE COURT: Much of this matter was covered in the pre-sentence report, Mr. Hirsh.

MR. HIRSH: It is only to show the state of mind and understanding, Judge, is the reason I bring that out.

THE COURT: Very well.

Q (BY MR. HIRSH) Were you aware of the fact when you left Arizona to go to New York that your [fol. 11] trial was coming up on March 31, 1970?

A No.

Q Now, let me show—you did receive a letter from your lawyer, Mr. Whitney?

A Yes.

Q And I am going to show you Exhibit A, that we are marking for this hearing—well, I'm sorry. Let me show you Exhibit—Exhibit B, I'm sorry, that we are marking for this hearing, and ask you if that is a copy, or is that the letter you received from Mr. Whitney advising you the trial date was March 31st?

A Yes, sir.

Q And how long after March 31st did you get it; a few days thereafter, as I understand?

A I received this approximately three, four, as much time as it takes for the mail to get from Arizona to New York.

Q Okay. Now, did you try and get in touch with Mr. Whitney at that time?

A You see, when I received this, I was more or less, well, I wasn't shocked, but I was surprised, because I'd been pending this trial, so right away when I received this, I said, oh my God, and then I figured well, I have to get some money to get out there, and I didn't do this, [fol. 12] I could have picked up the phone and called my mother, but I felt, see, all this time I'd been pending this trial, I didn't want my mother to know, and she didn't know I was in this trouble, none of my family did, I wanted to take care of it by myself, and I—

Q What was the reason why you didn't want to tell your mother?

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A Well, because it was—I was very embarrassed, and she has her own family over there and I felt very bad that she should know I was in this kind of trouble, I knew it would hurt her, and it would be, you know, a big change, it would hurt. Everybody would be upset.

Q Did you try and take any steps to get some money, or contact Mr. Whitney and explain what your position was? What did you do in this regard, if anything?

A Okay. When I received this letter, I thought of contacting him, but I—then I said to myself, I have to get some money first, because if I contact him, and with no money, I still would tell him that I wouldn't be able to make it unless I receive this money. Now, I'll say this to the Court, I didn't say it before because I felt [fol. 13] that it would have a bearing against me, but when I came home, I was separated from my wife, we got separated this time, and I financed my wife's trip, before I received this letter, to Puerto Rico, with the money I had, because I obtained a job when I first got to New York, so I was left without money, so what I said to myself was that let me get the money first and then call Mr. Whitney, you see.

Q All right. Did there come a time that you received another letter from Mr. Whitney?

A Yes.

Q Let me show you Defendant's Exhibit A and ask if that is the letter you received?

A Yes, this is the second letter.

Q When did you receive that?

A When I first got in contact with this letter, it came to my hands, it was—it was on Thursday night, I don't know what date that was, but it was the night before I came to turn myself in the following day, that is when I received this letter.

Q Do you know why that letter is dated March 18? Do you know why you received that letter so late?

A Yes, it was delayed because there was a mail strike in New York at this time.

[fol. 14] Q Okay. Let me ask you; did you call Mr. Whitney prior to the trial?

A Yes, I called.

Q When did you call?

A I didn't give him much time, or myself either. I called him when I knew that I couldn't even get the money together, I gave him a call the day before my trial and told him, Mr. Whitney, this is Tony, I am trying to get the money, as of now I don't have the money, and he said to me, well, Tony, you realize that if you don't show up for the trial they are going to go on with the trial without you being there, and then I said well, Mr. Whitney, I am trying to get the money, and as soon as I get the money I am going to show. This is what I told him.

Q All right. Did you—did your parents somehow find out about the fact that this trial was—that you were being charged with this offense?

A Yes.

Q How did they find out, and what happened there?

A Okay. My mother-in-law, which is the address 503 West 177th, received this letter and opened it, and she [fol. 15] received this letter actually two days before I received it because I wasn't living in that house, I was working for an invalid, a para phylitic (phonetics), and she didn't know the phone, sor she received this letter, and realizing what the contents of the letter was, she called my mother in Miami and told her, and told her that I was in trouble, and that I didn't want to let her know but it was about time that, she thought, she should know, because of the fact that I was helpless, I couldn't help myself, as far as getting the money to go there, so my mother got in contact with the only number that my mother-in-law had, which I was staying in another place, and she got in touch with this fellow, and then the fellow got the number where I was at and called him, and he told me that my mother was trying to get in touch with me to please call her, and it was at this time that I called my mother, and she was very upset because of the fact that I didn't tell her I was in trouble, and she was really upset because of that, and she told me that —that I should have, and all this, and then that is when she made arrangements for me to receive money to come out here to the trial.

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Q And when she gave you the money, did you come [fol. 16] immediately out here?

A Immediately. My father came from Spain, and my mother sent him to New York and he came, and it was late that night when he arrived, approximately ten p.m., and the following morning at eight o'clock we were on our way to the airport.

Q And you contacted Mr. Whitney immediately upon coming to town in order to turn yourself in to the—

A Well, no. I arrived on Thursday night. Thursday night. The following day was Friday, and it was late. I arrived—my plane was delayed because of the traffic in New York, the airplane. So I arrived here at 12:59 Arizona time, and came straight on post to stay the night with a friend of mine who was married, and I told him the situation. He was kind enough to let me stay there. And the following morning I called early in the morning, Mr. Whitney's secretary, and he said—she said he's not in, so I called again and told her to tell him that I was on my way to go there.

Q And you turned yourself in; you met Mr. Whitney and then you came to the Court together; is that right? [fol. 17] A Yes. I met Mr. Whitney.

Q Okay. I just have two more questions for you. Did—three more—were you ever aware of any order out against you by the Court ordering you to be here on March 31, 1970?

A Well, I'll tell you, I'm not sure, but Mr. Whitney, when I called him the day before the trial, told me that if I don't show up they would issue a bench warrant on me. I said, Mr. Whitney, I have no intention of not coming, I am coming, you see—

Q All right.

A —but of course, that wouldn't stop the Court from issuing this.

Q All right. But that was all that you were aware of, is what you have already related to us insofar as any order ordering you to be here by the Court; is that right?

A Yes.

Q And you knew that when you came in voluntarily, you knew that there was a bench warrant out against you and that you would be thrown in jail?

A Yes, sir.

Q You knew that?

A Yes, sir.

[fol. 18] Q And you came in knowing that; is that right?

A When I turned myself in to Mr. Whitney, Mr. Whitney advised me they had a bench warrant out for me.

Q So you knew when you were coming out here you would go to the jail, or in the county jail here?

A Yes.

Q Tony, one more question; did you ever intend in your mind to violate any order of this Court?

A I swear, I just swear I never did.

* * * *

CROSS EXAMINATION BY MR. SLAUGHTER

* * * *

[fol. 18] Q Your wife's name is Crimilda?

A Yes.

Q And either she, on her own or after a discussion [fol. 19] with you and the CO, came and talked to me in my office about having you released; you were aware of that, were you?

A Yes, I was.

Q So this was done; an order was prepared releasing you to the military authorities?

A I never received a copy of anything.

Q No, but you did get out of jail and went back to your duty station?

A Yes, I did.

Q And at any time after that, even up to the time when you were separated from the service, did anybody there, anybody in any authority, say anything to you about the charges pending?

A My CO told me that, of course, that I would have to notify the proper authorities to leave, before I left.

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He told me like this, he said, make sure that you let these people know—

Q Uh-huh.

A —because otherwise it could mean trouble for you, but I already knew I had to do this, because on the federal charge I was—I wasn't—I wasn't permitted to leave the state, I would have to be granted permission.

Q So who did you notify with regard to these charges here?

[fol. 20] A I notified my lawyer, Mr. Whitney.

Q And you didn't make any notification to anybody in the Clerk's office where this file was being maintained, concerning this action; I mean, you didn't—

A The Clerk over here?

Q —let anybody at the courthouse know?

A No. Nobody told me I had to do this. I didn't know.

Q You were present in court on March 31, 1969, when your original trial setting was held, isn't that right, and you, on March 31, '69, the Court set your case—

THE COURT: Just a minute.

MR. HIRSH: I'm sorry, Judge.

THE COURT: It's difficult for the Court to hear the testimony.

MR. HIRSH: Sure.

Q (BY MR. SLAUGHTER) On March 31, 1969, the Court set your case for trial for April 22, 1969; do you remember that?

A No, I don't.

Q You don't remember being there?

A That was last year?

Q Last year, 1969, when the minute entry of March [fol. 21] 31 says, defendant present in person and by James D. Whitney, Esquire; you don't recall being there?

A What date was this again, sir?

Q This is March 31, 1969.

A Yes, I remember being there.

Q You remember the Court setting your case for trial, the next month, April 22, 1969?

A I am not going to contradict you. I don't remember the trial was set. If it was set April 22, it's probably true, but I—but I can't honestly tell you I remember.

Q But then the Court records are correct, so far as you know in that you were present with your attorney?

A Yes, that's true.

Q Okay. And that the case was set for trial. Do you recall having discussed with your attorney after that hearing in court about, well, here's what we've got to do to get ready to go to trial and so forth?

A Yes.

Q Okay. Now, when were you arrested by the federal authorities on this other charge you have referred to?

A March the 23rd, between the 21st and the 24th, of 1969.

[fol. 22] Q Of 1969?

A Yes.

Q Okay. And didn't that have something to do with the fact that your trial setting for April 22 was vacated, or didn't come off on that day because you didn't go to trial on that day, did you?

A Well, I was released on that federal charge when I was confined there.

Q How long were you confined?

A Three days.

Q And then where did you go from there?

A I went back to the Fort.

Q And you were still in the military service at this time?

A Yes, I was.

Q Now I want to call your attention to another March, this is March 9, or in the March area of 1970, this year.

A Yes.

Q Now do you recall having talked to someone from the Internal Revenue Service concerning marijuana, and do you recall telling someone that "you'd never be brought to trial for the offense here and that there is no proof you have committed the alleged offense?"

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[fol. 23] A This is in March?
Q This March.
A No.
Q Okay. Then April of 1970; you recall having a conversation with someone from the Internal Revenue—
MR. HIRSH: I don't see what bearing that would have on this matter; in any event, what is the relevancy of this?
MR. SLAUGHTER: Well, it is relevant for this purpose, Your Honor. Mr. Hirsh has taken some pains to talk about—to elicit questions concerning the fact that Mr. Tacon had no knowledge that there was a trial setting. I think it is relevant if he is telling someone prior to March 9, 1970 that he'll never be brought to trial, and that there is no proof he committed the offense, he certainly was aware of the trial proceedings, and that the case in the natural course of events is going to come to trial, and that in the natural course of events he is going to have to be there.
MR. HIRSH: It is conceded he had a trial date. He received the March 3rd letter. What's the difference. He admitted he knew there was a trial setting.
[fol. 24] THE COURT: Objection is overruled.
Q (BY MR. SLAUGHTER) Now showing you State's Exhibit 1 for identification, calling your attention to the second paragraph beginning "Mr. Tacon"—do you recall prior to March 9, 1970, having talked to someone from the Internal Revenue Service concerning your case?
A This was not in 1970. It's prior.
Q I see.
A It was in 1969.
Q Okay. Then when?
A This was July, it was either in the month of July or in August.
Q Of 19—
A Of 1969. That a man from the Internal Revenue, his name was Mr. Howard.
Q And where did he come to see you?
A Well, he came to the company, Company B, Fort Huachuca, and then he came again. I saw him a second

time. He came there twice, and he asked me for money, which I didn't have, and he asked me if I would go and borrow it.

Q This is to pay the tax on the marijuana?

A Yes. And then he came again and asked me if I had any way of doing this. I said—

Q How long after the first time did he come this [fol. 25] second time, or was this both the same day?

A Oh, no, no. This was a pretty-awhile. I'll say a month and a half in between.

Q Maybe August or September of '69?

A No. In—it was never in September. It was in August.

Q Okay.

A Because it was before my wife left, and I never saw him after my wife left, and then I saw him a third time when he—he gave me notice of seizure, he seized my car, because it was the only property that I owned, and he said that—he gave me—I still have this notice of seizure in my belongings.

Q Okay. Now, so anyway, you don't owe them any more money, or do you?

That's not important, really.

During any of this period of time, even as late as July or August of 1969, what contacts did you make with your attorney concerning when the case was going to come up for trial?

A Well I called him several times, but in long periods because I'd been pending this trial over a year, it's been over a year, you see, so I—

[fol. 26] Q Okay. Let me ask you this: Did you, about the same time you received this inquiry from the man from Uncle Sam, did you check with your attorney at that time?

A Yes, I did.

Q Do you recall when?

A As soon as that—as soon as I received these—it was like a slip of paper, saying that I owed the government $500, I received for one, and then I was sent another one for $200 stating that I owed this Internal Revenue this excise tax.

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Q And then what discussion did you have concerning the ensuing trial date, I mean, what did your attorney tell you in other words?

A Well, as soon as I received this I called my lawyer, and Mr. Whitney informed me that, he said it didn't seem right for them to do this because it would be self-incriminating, if I were to pay this tax, and that I would be self-incriminating myself, and he said he didn't know too much about this because it wasn't in his—how would you say—he was not familiar with this tax.

Q What specific conversation did you have with him [fol. 27] about getting a trial date, or a trial date to resolve this matter?

A Well, I asked him what was going to happen with my trial, when was it going to come up.

Q And what did he say?

A He said that he was trying to talk to the district attorney on reducing my charges, but what happened was is that since I got involved with this federal charge, that the chances for that were very very slim.

Q Now I believe you answered one of Mr. Hirsh's questions in saying that you didn't get any notification by mail of this trial date until the trial date had already passed; is that right?

MR. HIRSH: No, that wasn't his testimony at all.

THE WITNESS: No, I didn't say that.

Q (BY MR. SLAUGHTER) You didn't?

A No.

THE COURT: I think the testimony, Mr. Slaughter, is that he received this, the date was not fixed, but that it was mailed on or about the 3rd day of March, 1970, that whatever time it normally takes the mail to get to New York he would have received it. I think there is [fol. 28] some mention of a few days, or something like that.

MR. SLAUGHTER: Uh-huh.

Q (BY MR. SLAUGHTER) And then, I'm sorry that I misunderstood—but then, when did you actually receive this?

A Is that the first letter there, Mr. Slaughter?

Q I don't know whether it's the first or the second.

THE COURT: Here, here's the other one.
Q The one dated March 3rd?
A This is the first letter that I received.
Q Uh-huh.
A I received this about the 6th or the 7th.
Q Of March?
A Of March, yes.
Q And did you understand from reading that letter that this was the trial of your case set for March 31st?
A Yes, I understood.
Q And did you understand what Mr. Whitney said, to be there at least a week prior to that so that you could prepare for trial?
A Yes, I understood this.

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REDIRECT EXAMINATION BY MR. HIRSH

• • • •

[fol. 29] Q I have just been told by Mr. Whitney there was also a telegram sent to you.
A I never received that telegram.
Q Did you see it later?
A No, I never saw it.
Q All right.
A I was notified that I received a telegram when he talked to me on the phone.
Q That he'd sent you a telegram?
A Yes, but I never received that telegram. I never saw it.

• • • •

EXAMINATION BY THE COURT

• • • •

[fol. 29] Q Did you, Mr. Tacon, ever inform your Court appointed attorney, Mr. Whitney, that you had been released to the custody of the Staff Judge Advocate [fol. 30] at Fort Huachuca, Arizona, pending trial and that your personnel file had been flagged?

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A No, Your Honor, I never informed him of that because actually I didn't know what to do. You see, my orders were flagged but I didn't see how that had any bearing on the effect on Mr. Whitney, I mean, or any connection at all, but when I was released, and I was calling him, I told him that I was released. I let him know that I was released.

Q Were you aware that there was a requirement of notice to the County Attorney of your release from the service at Fort Huachuca?

A No, Judge. No, I wasn't.

Q What did you think flagging meant, Mr. Tacon?

A Flagging orders?

Q Yes.

A When they flag my orders in personnel that meant that I couldn't be shipped anywhere.

Q Or released, isn't that right?

A Well, I just know that I couldn't be moved from that Fort.

Q Right.

A That's right.

Q And you caused your wife or somebody else to go [fol. 31] to the county attorney to get authority to have you released to your commanding officer; did you not?

A Well, Judge, my wife did this on her own.

Q Well, you were aware of it, were you not?

A Yes, I was aware after the fact that she—she called me, and I picked up the phone, and she said that I spoke to your CO and your CO made arrangements, I think it was with Mr. Skaggs, to release you under the Army.

Q Who is Mr. Skaggs?

A Mr. Skaggs was that—I think he was the district attorney then who my CO spoke to.

Q Well you didn't think it necessary to let your attorney know that the county attorney should be advised that you'd been released from the service?

A I didn't know, Your Honor. Only thing I knew was that if I told him, that I thought he would know exactly what to do. I didn't know what I was supposed to do. I never was in any kind of trouble before. No one ever told me that I should inform the county attor-

ney. I called my lawyer who is the one who was defend-
[fol. 32] ing me that I got out of the Army.

Q You received the letter from Mr. Whitney, your attorney, a few days subsequent to March 3rd, 1970; did you not?

A Yes.

Q And at that time you knew that the trial had been set for the date of March 31, 1970.

A Yes, Your Honor.

Q And that you were expected to be here in Cochise County, if possible at least a week prior to the trial date of March 31?

A Yes, sir.

Q And then after having received the letter of March 3rd, being Defendant's Exhibit B, what is the next thing you did to advise your attorney, Mr. Whitney, about your appearance for the trial on March 31st?

A Your Honor, I didn't do anything until the day before the trial because all this time that—when I received this letter, up until the day I called him, I was trying to obtain this money to come and take the flight out here, Your Honor. I swear, I swear again, I had no intentions of not coming here. My intentions all were coming here. If I may say that, the person who I was
[fol. 33] working for, this para phylitic (phonetics), if you call him, or the district attorney will call him, he will tell you at this time that I was trying to get the money, and also my mother-in-law knows that I had no intention of not coming, I was going to come, you see.

Q And by the same letter, that is, March 3, 1970, which you indicated you received about March 6, 1970, you were advised at that time by Mr. Whitney, were you not, that the case would not be postponed under any circumstances?

A Was that in the same letter, March the 3rd?

(Letter handed to the defendant.)

A Yes, this I was aware of this, yes.

Q So you waited until the day before the trial; and then what did you do?

A I called him, when I realized that I had no way of getting this money, I called him the day before the

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trial and said, Mr. Whitney, I'm trying to get to Arizona, but as it looks now, I don't have any money, and I told him that I'm trying to get the money to make it tomorrow; he told me, Tony, please try and make it, because if you don't make it they are going to go on [fol. 34] with your trial anyway.

Q Now let me ask you this: During your period in the service, Mr. Tacon, you had some difficulty, did you not, with reference to your failure to return to duty?

* * * *

THE WITNESS: Oh, yes, Your Honor, I had difficulty.

Q BY THE COURT: And as a matter of fact, your status on more than one occasion was that of being absent without leave.

* * * *

THE WITNESS: Yes, Your Honor. It was pertaining to that from being absent without leave from my job.

Q From your job?

[fol. 35] A Yes. It wasn't that I left the Fort. I did not leave the Fort and go AWOL, I never went AWOL from Fort Huachuca.

Q Was there not an occasion, which was testified to by your mother at the time of sentencing, concerning the fact that you failed to return to duty, and had indicated to her that you were not going back to the service, but that she prevailed upon you, after considerable effort on her part, to return to duty so that you wouldn't get in any more trouble?

* * * *

THE WITNESS: This is when I first entered the Army that this happened, Your Honor.

Q (BY THE COURT) That's right.

A Yes.

Q That is the incident I am referring to.

A Well, I wouldn't say I didn't have any intention of coming back to the Army, that is untrue. I had in- [fol. 36] tentions of coming back, but I was having such difficulty in the Army that I was told that if—if I went

absent without leave numerous amounts of time I would receive a discharge.

Q Then what your mother told the Court at the time of sentencing was untrue?

A Well, what my mother said in court was that she called me and told me to go back, which I intended to go back, but not as soon as I went back, and she had spoke to my commanding officer, and my commanding officer told her, if you could persuade him to come back, it will be much better for your son, so at this time she called me, and I told her I had intentions of coming but not this soon and she made me go back sooner than I would have gone.

Q Again it was your intention all the time to return, is that right?

A Yes, sir.

Q As a matter of fact, what you really had in mind was just deserting the service entirely; isn't that right, Mr. Tacon?

A No, sir, that is untrue.

Q Who was your commanding officer at this time, and where was the station?

A I don't remember his name, but he was stationed [fol. 37] in an airborne unit in the 8th Battalion, Fort Gordon, Georgia. The last I heard of him, sir, he was —he went to Vietnam.

* * * *

Q (BY THE COURT) You have indicated, Mr. Tacon, that you received Defendant's Exhibit B, or Defendant's Exhibit A, the second letter, that is the one dated March 18, 1970, when?

A I received this the night before I left New York to come to Arizona.

Q That would be—you left on a Thursday night?

A No. I left—I left Thursday morning. It was on a Wednesday night.

Q That would be April the 1st, 1970?

A Yes, I guess.

Q And had you been in communication with your mother at that time?

A Yes, I was.

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Q And what did she tell you?

[fol. 38] A She had told me that my mother-in-law had called her and she had received this letter. That was the first knowledge that I received this letter, was through my mother, when I spoke to her on the phone, she told me that my mother-in-law received this letter and called her. She asked me if I knew this letter came, and I said no because I haven't been in contact with my mother-in-law.

That same night—my father came the next day, or the following day and I packed my bag and I went over to my mother-in-law's house to get a suitcase, and she gave me this letter.

Q How old were you at the time you received the notice of trial setting it for March 31, 1970?

A I was 21, Your Honor.

Q And you understood the contents of that letter, did you not?

A Yes.

Q There wasn't any question in your mind about the fact that the case was set for trial, was there?

A No.

Q There wasn't any question in your mind, was there, that the matter would not be postponed?

[fol. 39] A Well I thought if I called my lawyer that he would be able to make a motion or something.

Q Did you call him?

A Yes, I called him.

Q When?

A The day before.

Q The day before the trial?

A Yes.

Q You didn't call him before that, did you, between March the 6th, 1970, and the 30th day of March?

A Yes.

Q 1970?

A Yes. I called him before that but it was—it was on a Saturday, and I tried to reach him, if you could see on Exhibit B there, the first letter I received, I have arrows marked off where I tried, and called him in his Willcox home, but we called this number, there was no

answer, so I had to wait till Monday so I could reach him at this 432 number here in Bisbee, but I tried to call him beforehand at his house, but I couldn't reach him. The phone—I don't know—you could ask him if he had trouble with his phone. I really don't know, but there was no answer.

[fol. 40] Q Did you try calling him at his regular business phone?

A Saturday, sir, I figured he wouldn't be there Saturday.

Q So you called him at his Willcox phone?

A No, no. I called him during the week. I called him on a Saturday because this is when I found out about the, you know, I already found out about the letter, but I wanted to get in touch with him a couple days before the trial. When I called him the first time it was on a Saturday. You see, the next time I called him, I reached him, which was the day before the trial.

Q And this would have been the Saturday before the trial?

A No, no. Saturday I called him and I received no answer. I called him at his Willcox home, Sunday, I didn't call Monday, I called Tuesday at the office, at his office.

Q Well actually Tuesday would have been March 31, the trial date, would it not?

A Well then it was Monday. Dates I don't—

MR. HIRSH: Well actually what the Judge is asking you is the first time you tried to call him, Mr. Whitney, was the Saturday before the trial.

[fol. 41] THE WITNESS: Yes.

Q (BY THE COURT) After the matter was first set for trial on the 31st day of March, 1969, at which time the trial date was set for April 22, 1969, did you not cause to have the hearing continued from the trial date of April 22, 1969?

A Did I have the cause to continue it?

Q Yes, the April 22, 1969, trial date.

A No, I didn't have anything to do with that.

Q I am calling your attention now to a motion for a continuance filed April 21, 1969, wherein it was moved

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by your attorney that the trial setting for April 22, 1969, be vacated, and the matter be reset for trial at a future time; are you indicating to the Court you had no knowledge of that?

A No, I had—what I am trying to say is I had nothing to do with that. I appeared in court the last time when there was—my attorney made a motion for this, I was aware of it when—I was there. Like I said, I had nothing to do with that. You understand?

MR. HIRSH: Sure.

Q (BY THE COURT) Then you did appear when [fol. 42] the trial setting of April 22, 1969, was vacated? Were you present?

A No, my lawyer and I came into court for the last time and he made a motion for it to be postponed, or a later date, and that was the last time I went to court.

Q And that motion to continue the trial was at your request, was it not?

A I don't remember, Your Honor. It was too long ago. I don't remember.

Q Well you appeared, did you not? You have indicated you appeared at the time of the request and so—

A What I am trying to say, maybe my lawyer said that to me, he may have said, Tony, I am going to postpone your case, and I maybe agreed to it, because I felt whatever my attorney said was all right.

Q And at that time did he not discuss with you the provisions of a rule of the court which requires the trial of a criminal case not later than 60 days after the filing of the information?

A No, Your Honor.

Q And did he not discuss with you the necessity of waiving that right based upon your request for a continuance?

[fol. 43] A No, Your Honor.

Q And did you hear from your attorney after the 23rd day of March, 1970 about this same matter, about your trial date, the fact that a bench warrant was issued on the 25th day of March, 1970, for your arrest and detention?

A Was I informed?

Q Yes, after March 23, 1970.

A No, the conversation that took place on the phone, he said to me that if I—that if I didn't show for this trial, which was the following day, that a bench warrant would be issued then.

Q Well, was that when you called him on March the 30th, the day before the trial?

A Yes, Your Honor.

* * * *

TESTIMONY OF JAMES B. WHITNEY

(Petitioner's Court Appointed Counsel at Trial)

DIRECT EXAMINATION BY MR. HIRSH

* * * *

[fol. 44] Q It is my understanding that you were appointed to represent the defendant, Anthony Tacon, sometime in, I believe it was early '69, was it?

A March of 1969, I believe.

Q March, '69. And just to start at the beginning, Jim; did you find this man to be knowledgeable about legal matters and did he appear to have a ready knowledge of things that you discussed with him insofar as the law and procedure were concerned?

A I think as far as characterizing Tony is concerned, he was an extremely nervous person, and I think that he had difficulty understanding legal matters that I attempted to explain to him.

Q The first matter that the Judge and Mr. Slaughter asked about is this matter of the continuance. How did the continuance come about, if you remember?

A I frankly can't remember why it was I moved for the continuance.

THE COURT: Might I suggest something in the way of perhaps refreshing your recollection about it.

[fol. 45] THE WITNESS: Well, I moved, Your Honor, there is no question about that.

THE COURT: I am aware of that, but I might indicate to you a possible reason, whether you may recall it or not I don't know, but it is my recollection of the matter that the continuance was requested for the rea-

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son that the other matter in the federal court was pending and that you wanted to have that disposed of and out of the way before the trial. That's my recollection.

THE WITNESS: That could very well be.

Q (BY MR. HIRSH) Does that jog your memory at all, Jim, does that sound like it could have been it?

A I don't know. It seems like I had some correspondence with Roy Skaggs. I had—I had either heard from Tony, or I heard from Roy that there was some difficulty in Nogales and I believe at that time we both agreed that we would let it ride.

Q Is that Roy Skaggs and you?

A Yes.

Q Did you ever discuss it with Tony? Did Tony ever come around and ask you for a continuance, or trying to get you to delay this in any way? Do you have any [fol. 46] recollection of this happening?

A I do recall Tony calling me, and calling me concerning this difficulty he had in Nogales. I believe at one point in this March '69 interval of discussing with him what should be done in Nogales. He indicated that he had an attorney there and he indicated to me that the attorney knew me, although I couldn't recall him. I don't know whether it was a question of his not being available by reason of the fact that he was—he couldn't get bond or what. I really can't say that, but I know, I think the Judge is probably correct, it did have something to do with that.

Q Here is what I am trying to find out: Do you have any recollection at all of this young man coming to you and for some reason encouraging you to continue the case, in other words, was it continued because he was after you to do so?

A No.

Q Okay.

A No, it was my best judgment, Bob.

Q Okay. When—do you remember him—did you ever talk to him about—I notice there is a minute entry, not a minute entry, an order flagging the file in here, I see [fol. 47] this is part of the court order; did you ever talk to Mr. Tacon about that and go over it with him and explain to him what that meant?

A Flagging the file?

Q Well, there is a minute entry—

A No, I'll be quite frank with you. I did get those reports from Roy Skaggs—I didn't go into the minute entry—giving custody of Tony to his commanding officer. I thought, frankly, up until the first part of March of this year, that he was on his own recognizance.

Q You didn't think, in other words, when he called, he did call you, did he not, in December?

A Right, he did, about December the—

Q '69?

A —12th or 13th, I think, around in there.

Q And he told you that he wanted to leave, is that right?

A Right.

Q And did you tell him not to, or indicate to him—

A No.

Q —in any way that he should not?

A No. He gave me his address. I don't recall his [fol. 48] telephone number.

Q Was it your understanding he was released on his own recognizance, that he was free to leave the jurisdiction?

A That is what I honestly thought.

Q And I gather then in this Petition and Order for Reduction of Bond and Release of Defendant, signed by Judge Helm on March 3rd did not either come to your attention or certainly didn't come to the defendant's attention, as far as you know—let me show it to you, Jim, and see if that refreshes your memory on that. I don't know where I got it from, but I got it. Only thing I am concerned about is whether you ever called that to Tacon's attention.

THE COURT: I think actually this was accomplished before your appointment, Mr. Whitney.

THE WITNESS: Oh, fine, Judge. No, I don't recall, Bob, in answer to your question, receiving that, no.

THE COURT: That was accomplished, it would appear from the record, from the Court's knowledge of the thing, between the defendant and the county attorney's office prior to the appointment of Mr. Whitney.

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MR. SLAUGHTER: That's right, Your Honor, if I [fol. 49] may speak some words of fact. Mrs. Tacon came to see me and I had that order prepared.

MR. HIRSH: Was a copy of the order, if I may, out of sequence, ask Mr. Slaughter, was a copy of this order given to Mrs. Tacon or mailed to the defendant? I notice the order, or Xerox copy I have of the file, there is no record of this order being sent to Mr. Tacon, or any indication that it was given to Mrs. Tacon.

MR. SLAUGHTER: I don't know because the procedure in that case would be for someone in authority from Fort Huachuca to come and pick him up and physically take him back to Fort Huachuca and whether they gave him a copy of that, I don't know.

MR. HIRSH: And you have no recollection of whether Mrs. Tacon got a copy of that?

MR. SLAUGHTER: I couldn't tell you that.

Q (BY MR. HIRSH) Jim, you then, as I understand, you got Tony's address, and he left for New York.

A Right.

Q Did he ever indicate to you at any time, at that time or up until March of 1970, that he was not going [fol. 50] to come back in here and not going to appear for trial?

A No, never.

Q When did you next hear from him? It is my understanding you wrote him letters that we have offered into evidence here, Exhibit A and B, and I understand you also sent him a telegram.

A That's correct.

Q And the telegram was, I understand, March 24, 1970, is that right?

A Right. It would be at the time I received the minute entry, or had knowledge of the minute entry that he was going to be tried. And let me add this too.

Q Go ahead.

A One of the reasons for the telegram was that they had that postal strike on, or was thereabouts.

Q Were you aware of the postal strike at that time, were you fearful that your letter might not get to him?

A That's correct, and I think when I thought I

couldn't wait on any chance, I had to get to him, get in touch with him as soon as I could, and that's the best way I could think of.

Q All right. Now, did you, on March 30, receive a [fol. 51] call, 1970, receive a call from Tony, from New York?

A Yes.

Q And tell us what he said to you in that call.

A Tony called about 11 a.m. on March 30. He asked me first of all what's going on. I indicated to him that we had a trial setting tomorrow. It's my recollection I urged him to be here. He indicated that he had no money, and he told me to explain it to the Judge, and I told him that I didn't think there was any chance at all of a continuance, that we had to go ahead, and please, for God's sakes, get here the next day.

Q And did he indicate to you that he would try and get out here?

A He said he would try.

Q And how long after the trial did he get here? Do you remember the date that he arrived, that he contacted you?

A The first time I saw Tony was the following Friday.

Q That would be the—when would that be in terms of dates?

THE COURT: Third of April.

MR. HIRSH: Thank you, Judge.

[fol. 52] Q That would be 3 April, is that right, Jim?

A If that is the following Friday, yes.

Q That would be Friday, according to the calendar, is that right?

A That's correct.

Q And you told him about the—did you tell him about the bench warrant that was outstanding for him, or was there talk about a bench warrant on the telephone, or when he came back here?

(Interruption.)

Q (BY MR. HIRSH) Jim, did you ever make it known to the defendant that there was orders from the

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Court, or Court orders, ordering him to be present, did he ever see such an order to begin with, any Court order ordering Mr. Tacon to be present in Bisbee on March 31?

A I don't recall myself of any such order. I know that there was a trial setting. I knew that there was a bench warrant which was issued pursuant to order March 23, 1970.

Q That was the bench warrant that was issued the week prior to the trial?

A Right.

Q At a hearing that you had with the county at-
[fol. 53] torney?

A Right.

Q But were you aware of any other orders that either—let me ask you—were you aware of any oral orders that were directed by the Court to Tacon ordering him to be present in Bisbee on March 31, 1970, for trial?

A I know of no order.

Q Do you know whether or not—I believe the file did reflect that, well, Tacon was present in your motion to continue, was he not, I think the Judge suggested that he might have been; do you have a recollection? Does the file show that, Judge, that Tacon was present?

THE COURT: No, the defendant said he was the one that was present at the time the motion to continue was granted.

Q BY MR. HIRSH Does that sound right to you?

THE COURT: The file does not reflect it one way or the other.

Q Does the file reflect that the new trial date was issued from the bench at that time, or was it—does the file reflect in any way what—how—how the defendant was notified of the trial date? I know myself, many times counsel is notified by mail rather than the trial
[fol. 54] date being given in open court.

THE COURT: The record only shows that the motion for continuance and whatever was filed, April 21, 1969, a motion in writing, signed by the attorney for the defendant, that the order was signed on the same date.

Q (BY MR. HIRSH) Jim—I'm sorry, Judge.

THE COURT: And the order also was filed on the same date as the motion.

Q Jim, do you have any—first of all, do you recall Tacon being present with you in court at the time you filed the motion to continue?

A That is the written motion?

Q Yes.

A No, I don't believe so.

Q Do you recall Tacon ever being with you in court at any time where he was advised of the trial date being March 31, 1970, or ordered to appear on March 31, 1970?

A No.

Q Did Tacon ever indicate to you that he would not appear for trial?

A No.

Q And—

[fol. 55] A Except March 30 of this year. There seemed to be some question, March 30, 1970.

Q But he did want to—he had a desire to be here and attempted to get here but was unable to do so because of financial reasons, is that what he stated to you, is that right?

A He told me he was going to try to get here.

Q And he told you that the financial reasons might prevent him from doing so, is that right?

A Yes.

* * * *

CROSS EXAMINATION BY MR. SLAUGHTER

* * * *

[fol. 55] Q You were present in court on March 23, 1970, when the deputy county attorney moved for a bench warrant for the arrest of Mr. Tacon?

A No, sir, I wasn't.

Q You were not. Did you receive a copy of the minute entry of March 23?

A Yes, I did.

Q Now on March 2, 1970, the minute entry was issued setting the trial for Tuesday, March 31, 1970; now, was that done in open court or did you receive [fol. 56] the copy of that minute entry by mail?

A I received a copy.

Q By mail?

A Yes.

Q And at that time you were the attorney of record for Mr. Tacon?

A Yes, I was.

Q And after you received that minute entry dated March 2nd, 1970, you sent your two letters, one dated March 3 and the other March 18, is that right?

A That's correct.

Q Now Mr. Tacon testified that after he was released by the federal authorities there was some time when nothing happened. What is your recollection of any contact made by Mr. Tacon relative to, well, let's get the show on the road, or let's get the thing to trial, or what is happening, or anything like that?

A Now could you tell me, please, what dates?

Q Yes. I am talking about the period after he was released by the federal people, which would have been maybe late April, 1969, through, say, August or September of 1969, or even later up to that December date [fol. 57] that's been mentioned.

Let me be more specific. How many times do you recall having been contacted by Mr. Tacon in connection with this case?

A Seems to me two or three times.

Q Could you give us any idea of the dates?

A If I may go through my file.

Q Fine.

A I may find slips. One of my call slips indicates that Tony called on June 20, 1969.

Q Was there any conversation relating to when do we go to trial?

A If I may state it this way. Tony would call and ask me what's up, what is going on, and I would indicate that we had no trial setting that, you know, at the moment, there was nothing going on, that the case was more or less in abeyance.

Q Where did he call you from in that June date?

A He called me from Fort Huachuca. He called me twice.

Q Twice in June?

A Yes. No, no, no. Twice on the same day, June 20, 1969.

[fol. 58] Q Uh-huh.

A He called me, I show a record of his calling, and my returning the call on June the 3rd, 1969. I have a record in my file of calling the first sergeant, or company commander, on July the 14th, 1969.

Q And that would have been concerning what subject?

A Oh boy.

Q Would it have had anything to do with Mr. Tacon's status as being in the military service or out of the service?

A Seems to me I wanted to get in touch with him on that date.

Q And you were using the first sergeant as a means to get him?

A Right. Tony wrote me a letter November 20, 1969. I show my office stamp as indicating that I received it on November 24, 1969.

Q Now any time prior to this November time was a conversation had concerning the federal people's wanting him to pay this marijuana tax that he has testified to?

A I do recall that, Mr. Slaughter, but I honestly can't recall when it was that it took place, and I do recall Tony asking me what should I do, and I believe I [fol. 59] advised him to talk to his Nogales attorney, that I had no experience in the federal courts. I didn't know the federal proceedings. I just wasn't conversant with the subject. It did seem to me a little bit odd there was such a proceeding.

Q Did you find out later that it is not an odd proceeding at all?

A I understand they do it quite often.

Q Yes.

A I also think in a recent decision that they did hold it was self-incriminating. Maybe I am mistaken.

Q What is the next contact after this November time you have testified to?

A Now he called me on December the 11th, 1969. My call slip again indicates that he called at 2:35, and

the indication is on the call slip that he would call in the morning, which would have been the following day.

Q Uh-huh. And did he call the following day?

A Yes.

Q Where did he—

A The following day or shortly thereafter. I can't—. [fol. 60] Q Where did he call from?

A I believe it was Fort Huachuca.

Q And did any of these conversations have anything to do with his release from the armed forces?

A Yes, I am sure that the December 12th or 13th conversation that was the reason that he called me.

Q Did you have any conversation with regard to his file being flagged or anything at any of these conversations?

A I don't know, frankly, Mr. Slaughter, that his file had been flagged. Again I was under the impression that he was on his own recognizance.

Q He never told you that his file had been flagged?

A No.

Q He never asked your advice as to what to do with regard to his impending discharge from the service because his file was flagged?

A No.

MR. HIRSH: That is a misleading question. My objection is there is no evidence showing that he ever knew this file was flagged.

MR. SLAUGHTER: Other than his testimony. He [fol. 61] said he knew it was flagged, Mr. Hirsh.

THE COURT: Yes. Objection is overruled. I think there is testimony to the effect that—

MR. WHITNEY: My testimony, Your Honor—

MR. SLAUGHTER: No, it is my—

THE COURT: May I finish my statement, gentlemen. I think there is testimony to the effect that he, the defendant, had informed Mr. Whitney that he needed a clearance from the Post because the file was flagged.

THE DEFENDANT: No.

MR. HIRSH: Just a minute.

MR. SLAUGHTER: Well, that is my recollection, too.

THE COURT: That is just a note that I made while

the defendant was testifying. The objection is overruled.

MR. SLAUGHTER: Thank you.

Q (BY MR. SLAUGHTER) So you don't—you didn't have any discussion with him about him asking you any advice about what to do because his file was flagged?

A No, no, I don't recall that.

Q Did you then, other than the fact of this flagging [fol. 62] think—did Mr. Tacon seek your advice on the propriety or the legality of his leaving the state or anything like that in view of his impending release from the service?

A No, I couldn't, as I say, I couldn't see at the time any difficulty. He had given me his address, he had indicated to me that he was going to call the commissioner, or somebody to do with the people in the federal people.

Q Did he ask you—I'm sorry—did I interrupt you?

A No, that is about all.

Q Did he ask you whether or not he should furnish this address to the Court or to anyone else in connection with this case, namely the county attorney?

A I don't recall his asking, and once again, I never indicated to him that he should furnish it.

* * * *

EXAMINATION BY THE COURT

* * * *

[fol. 62] Q Mr. Whitney, what was the date when the telegram you have mentioned was sent to the defendant? [fol. 63] MR. HIRSH: Judge, I have a copy of it, if the Court wants it.

A It was sent on March 24, 1970.

Q And did you have occasion to have the telegram traced and learn what disposition was made of it, or that the defendant received it?

A I had—I had no idea, Your Honor—I knew that this was a week from trial, I thought this was the best method of contacting him as quickly as I could.

Q On your telephone call from Mr. Tacon on the 30th of March, 1970, did you at any time mention to Mr.

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Tacon that a bench warrant would issue in the future if he failed to appear?

A Your Honor, I was—I was under the impression that a bench warrant had been issued, had been issued as of March 23. It is my recollection that I did inform him that the bench warrant had been issued.

Q And was there during this conversation with Mr. Tacon an acknowledgement by him of the receipt of your letter of March 3, 1970, being Defendant's Exhibit B in evidence?

A Not as such, sir. In other words, there wasn't anything, I got your letter of March 3rd. I was under [fol. 64] the impression that he had received it.

Q And did he indicate to you in any way that he knew that the case was set for trial on March 31, 1970?

A I don't recall his indicating to him—I did indicate to him as he has testified that he had to be here the next day.

Q But in your correspondence—in your conversation with him on the 30th day of March, was there any discussion had concerning your advice to him by Defendant's Exhibit B that you wanted him here at least a week prior to trial to prepare for the case?

A I can't recall, sir. If I may state this, I wanted to get the boy here whether he had received the letter the 3rd day of March wasn't—I didn't feel that important, you know, insofar as any recrimination on my part. I just tried to urge him every way I could to be here, be here the next morning.

Q Did you ask him at all concerning the fact that he had not communicated with you since March 3rd and up until the date of the call that is March 30th, 1970?

A I may have said, why didn't you get in touch with me.

[fol. 65] Q Did he make a response to that?

A Seems to me he said, I was trying to get the money.

Q Did you advise him that it was necessary that he appear for the trial?

A Yes, sir.

Q And what did he say about that?

A Well, once again, he said—he said I'll try. Explain it to the Judge, please. I think that was in response—he

said how are we doing or something, and I said how do you think we are doing, if I don't have a client.

Q Now it's indicated that you were not present on the 23rd day of March, 1970 at the time when the minute entry of that date was made.

A Yes, sir.

Q Did you not, with both Mr. Skaggs and with the Court, discuss the subject matter of the proceedings on that particular day?

A Yes, I did.

Q Before the making of the order?

A That's right. I believe that I called either the Court, or Mr. Skaggs, and said what are we going to do next week, and I believe there was an indication that the trial would go ahead as scheduled, and it was—it had [fol. 66] to be, because subsequent—it was subsequent to the 24th of March that I received the minute entry.

Q And thereafter you sent your telegram dated March 24?

A Well actually, I sent the telegram before I received the minute entry, as soon as I had an indication that the trial was going ahead, I indicated the telegram to my secretary and told her to get it on the wire.

THE COURT: And the date of March 23, 1970, the Court will state was the regular law and motion day, or the regular day for taking up criminal matters, and the order was made in your absence, was it not, Mr. Whitney, for the reason that you were unable to be present at the time of those proceedings on March 23?

A I don't believe that I was in the—I was in the county, or in the city on that date.

Q But there was an emergency existing in your mind in trying to procure the presence of the defendant for trial; isn't that right?

A If I may expand on that a little, Your Honor.

Mr. Skaggs had an out-of-state witness. He had located the witness, and he called me on several occasions, and he said, are we going to go, and I believe I told [fol. 67] him on those occasions—I am speaking of the time between the 3rd of March and the 23rd—that I indicated to him that I hadn't heard from Tony yet, I didn't know. And he said, you know, then he would

indicate, well, the County is going to spend about a thousand dollars getting this guy down here. Will you let me know whether or not he's going to be present.

Q And as a result of the concern of the county attorney, and your concern about getting the defendant here, the minute entry order of March 23 resulted, did it not?

A I'm sure it must have. I'm sure it must have.

Q As a matter of fact, insofar as the procurement of the presence of the witness which mas mentioned by Mr. Slaughter is concerned, it was necessary that a writ of habeus corpus for the purpose of securing his release from the federal reformatory at El Reno, Oklahoma, was necessary, wasn't it?

A It is my understanding that a writ of habeus corpus was issued.

Q I think you have indicated, have you not, Mr. Whitney, that you did not have the telegram of March [fol. 68] 24 traced?

A No, sir.

THE COURT: Is it your recollection of the testimony, Mr. Slaughter, that the defendant denied receipt of the telegram?

MR. HIRSH: He did, Your Honor.

MR. SLAUGHTER: Yes, sir, he said he never got it.

* * * *

ADDITIONAL TESTIMONY BY
PETITIONER ANTHONY LOUIS TACON

DIRECT EXAMINATION BY MR. HIRSH

* * * *

[fol. 68] Q Tony, do you have any reason why you didn't—do you know of any reason why this telegram [fol. 69] didn't reach you?

A I did not receive this telegram at all. I had no knowledge that he had sent one, or had reason to send one, or received it, or heard that—that someone else had received it. By that I mean, my mother-in-law, whether she received it, she did not let me know.

Q This is your mother-in-law's address, is it not?

A Yes, it is.

Q And you were not living at that address; is that correct?

A No.

Q And you, I understand, were having some trouble with your wife at that time?

A Well, it was a mutual thing. We decided to get separated when I came back from the service.

Q And your wife was the daughter of the lady that lived at this address—

A Yes.

Q —is that correct?

A Yes.

Q Could it have been that the lady, your mother-in-law, your wife's mother, did not notify you of the existence of this telegram?

A Yes, but I doubt very much that she received [fol. 70] it because of the fact that when I got there the night before the only thing she gave me was the second letter that I received—that Mr. Whitney had sent me, because I'm sure that if she would have received that she would have told me, Tony, you got this also.

Q And, Tony, you tell us you didn't see it, you are telling us the truth, there is no reason to lie about that?

A Right, I did not receive this telegram.

Q You knew that the trial was March 31st in any event, right?

A Yes.

Q Tony, one last question. This matter the Judge asked you about, your records being flagged and whatnot, and I tell you frankly I don't know what flagging means; did you know from any source that you were supposed to stay in Bisbee after you got released from the service, and number two, did you ever hear of there ever being a duty upon you, yourself, as an individual, to call the county attorney and tell him?

A No, nothing at all. The only thing I knew that when I was clearing post that I was going to be discharged from the service and that I had to ask permission [fol. 71] to leave the state through the commissioner of Nogales, Commissioner Reyes, and that was the only per-

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son that I really had to ask permission to leave this state—

Q All right.

A —and I did so, and he, himself, on the phone, verbally granted me this permission, and I gave him my phone and my address, and he indicated to me that if I had any intentions of not coming that it would be a very serious matter because then the FBI would come along for me. I understood this very clearly.

Q One last question. Were you in court—there is a question in my mind what the testimony was—were you in court, and think very clearly on this, on April 21, 1969, when Mr. Whitney filed on your behalf a motion for a continuance?

A Okay. Now, I recall in my previous testimony I said yes I was, but I said this because I didn't know for sure, you know, but like he said, no. You see, I can't remember, to tell you the truth. That's the whole truth.

Q Were you ever in court when you can ever recall the Judge telling you that your trial would be set for March 31, 1970?

A 1970?

Q Yes.

[fol. 72] A No.

* * * *

CROSS EXAMINATION BY MR. SLAUGHTER

[Transcript of Record of May 4, 1970 (page 72, line 5—page 76, line 26)]

CROSS EXAMINATION

* * * *

[fol. 72] Q Your commanding officer, when you were at Fort Huachuca in March of 1969 was Captain Brummel?

A Repeat the date, sir?

Q In March of 1969.

A Captain Brummel, yes, that's correct.

Q Okay. Then you were arrested on this charge and being held in the Cochise County Jail and someone from Fort Huachuca came and picked you up, right?

A Yes.

Q Who was that someone?

A This was a Sergeant Clay. He was an NCO, and he was not a military police, he was just an NCO from my company, and he picked me up and took me straight to my company.

Q Picked you up from the jail?

A Yes, right here.

Q What did he say to you?

A He didn't say anything at all. He said you are to come with me, and I said where are we going. He said [fol. 73] I'm to report to—to bring you back to the CO.

Q Okay. Did he take you to the CO?

A Yes, he did.

Q And that is Captain Brummel?

A Yes, sir.

Q What did Captain Brummel tell you at Fort Huachuca on that day?

A He told me that I was to be put on restriction and to move my belonging from off post on post and that I would be restricted indefinitely.

Q And he told you that your file was being flagged, right?

A No, I don't recall.

Q You don't recall that?

A No. I don't think he even said anything like that.

Q He said you were to be restricted to the post indefinitely period?

A Restricted to the company area. I couldn't leave the company area, and then, of course, I requested permission to go off post and move my personal belongings on post.

Q Well then how long were you in fact restricted to your company area?

A I was restricted until March the 20th. It's not [fol. 74] a definite date, but March the—in the 20's, in that particular time.

Q And then the restriction was lifted?

A Yes.

Q Who told you about that?

A Who told me about that?

Q Uh-huh.

A Well, you see, he had told me that I was on restriction indefinitely and then a period of time passed and he kept saying that—I went in there for some—for something, some minor offense, and he said to me, don't start messing up now, Tacon, said you are doing well, and I'm getting good reports from your platoon sergeant, and I said all right. So then he set a date on the board, which is on the bulletin board there so you can see when your restriction is lifted, and he put it down March the 20th, March 21st, around this date. See, it was the day after my restriction was lifted—that I got arrested.

Q In Nogales?

A Yes.

Q And was it Sergeant Clay who came over to Nogales and picked you up?

A No, no. I was let out on my own recognizance, [fol. 75] under—my wife signed for me.

Q That's Crimilda Tacon?

A Yes, sir.

Q She signed for you in Nogales?

A Yes, and Judge—the Superior Judge there, Commissioner Reyes, also stated that I would be put on what you called a personal bond and that I were not—I was not allowed to leave the state, if I was, and caught, I would be liable to a $500 fine and put back in jail.

Q And you are sure that Captain Brummel said nothing to you about your personnel file, or about being transferred from the—you couldn't be shipped to another station, or transferred from the post without something being done concerning this personnel file?

A No, he didn't tell me this. I—in my company there are individuals who work in personnel.

Q Oh, then someone of these other fellows told you?

A They just told me that my orders were flagged.

Q How soon after March 3rd did they tell you that?

A Oh, I don't know. I couldn't say.

[fol. 76] Q How many of these fellows in personnel told you that?

A One.

Q One. Do you recall his name?

A No. He was the person who handled it.

Q The personnel files?

A Yes.

Q In the personnel section of the company headquarters?

A Company B Garrison, yes.

Q And you believed him?

A Well, I just said, what do you mean my orders are flagged. He said well, you can't take leave, if I put in for leave to go home on Christmas or something, that couldn't be done. He also told be that—that I couldn't be shipped to Vietnam.

Q Uh-huh.

A That is what he told me.

Q After you found that out did you go back to Captain Brummel about that?

A. No.

Q Why not?

A Why didn't I go talk to him about it?

Q Yes.

A I don't know. It didn't interest me.

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REDIRECT EXAMINATION BY MR. HIRSH

[fol. 77] Q The only question I have; flagged meant to you that you couldn't be transferred out from post to post by the military?

A Right, right.

• • • •

INTERPOSING QUESTION BY THE COURT

• • • •

[fol. 77] THE COURT: Well, actually, didn't flagging mean to you that you could not leave the post without getting a proper clearance from the proper authorities?

A No, I thought of it like this, like the way he explained to me; I said, what does this mean. He told me, well, if you wanted to go on leave, they wouldn't give you leave for the fact that your orders are flagged, and he says to me like in a smiling way, that you wouldn't—it would be impossible if orders came down for you to go to Vietnam, you couldn't go because of the fact that my orders were flagged. That is what he told me.

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COURT'S FINDINGS AND DISPOSITION

• • • •

[fol. 78] THE COURT: Well, the Court, certainly intends, Mr. Hirsh, to see that the rights of the defendant are not violated either in the way of a finding of contempt without following the strict legal requirements, and the Court will take the matter under advisement, and the defendant will furnish the Court with citations of the authorities, citation of the case referred to, which the Court has not received, by letter or some other such means, as long as the Court receives it, and the county attorney is advised of the citation of the recent case which counsel has referred to, and the Court will review the matter in the light of that decision, and in the meantime, is going to ask that the county attorney proceed with investigation of the matter of the defendant's conduct at the time he was stationed in Fort Gordon, [fol. 79] Georgia; in addition, ask that a tracer be made on the telegram mailed by the attorney for the defendant, that is, Mr. Whitney, on March 24, 1970, and perhaps the military might be of some assistance in getting information at the other end concerning the telegram in view of the situation that's arisen in this matter.

• • • •

MR. HIRSH: Mr. Tacon has just asked me if he could make a statement. I said about what. I thought everything was brought out.

THE DEFENDANT: If it please the Court, Your Honor, when I left Arizona, when I got discharged from the Army, the procedure that I took before I left, to my knowledge, I thought that when I left, when I called my two lawyers and let them know where I was going, where I could be reached, I had no idea at this time, that when I left, nothing at all, I thought I—that I was in the right; if this is true, that I shouldn't have done this without notifying the district attorney, I had—I had no idea I [fol. 80] should have done this, because if this was so you would have taken these additional steps before I left.

When I called Mr. Whitney on the 30th, I had asked Mr. Whitney, I said, Mr. Whitney, I'm trying to make it, I'm trying to get the money; as of the moment I don't have the money, but I'm going to try to make it. He told me, Tony, make it, you've got to be here for us to get anywhere. I said, Mr. Whitney, I understand, and then I said, what if I don't make it tomorrow, he told me a bench warrant would be issued for your arrest. Now, to me, it seems on his testimony that it was a misunderstanding because I had no idea, no knowledge at all that a bench warrant was issued on me on March the 23rd. All the time I was in here up until now, at this hearing here, was—was I aware of the fact that I was—a bench warrant was issued in the 23rd. I thought that the bench warrant was issued because of the fact that it was issued on the 31st of March, which was the day I was supposed to be here for trial. Of course, the Court has no way of knowing, actually, how I really did feel, but I tell the Court that I had—that I had no intentions of not coming.

THE COURT: I might say this, Mr. Tacon, the [fol. 81-82] Court is impressed not a bit by your expressed intentions in this case. I don't believe any of them, and I just can't see any justification or excuse for your conduct. That's all.

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[fol. 83] THE COURT: The record may show the filing in open court of Application for Certificate of Probable Cause, Notice of Appeal, and Application for Ad-[fol. 84] mission to Bail. All other matters are taken under advisement.

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# IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 2163

STATE OF ARIZONA, APPELLEE

*v.*

ANTHONY LOUIS TACON, APPELLANT

ORDER AFFIRMING JUDGMENT

Appeal from the Superior Court of
Cochise County Number 7406
Honorable Lloyd C. Helm, Judge

Gary K. Nelson, Attorney General
Carl Waag, Former Assistant Attorney General
Paul Prato, Assistant Attorney General
Attorneys for Appellee

Robert J. Hirsh — Attorney for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its opinion. It is accordingly ORDERED that the judgment of the trial court is affirmed.

DONE IN OPEN COURT this 23rd day of September, 1971.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming Judgment, made and entered in the above entitled cause by said Court on the 23rd day of September, 1971.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 27th day of October, 1971.

CLIFFORD H. WARD
Clerk
By Mary Ann Hopkins
Deputy

cc: Attorney General; Cochise County Attorney; Judge Lloyd C. Helm; Presiding Judge of Cochise County; Board of Pardons and Paroles; Superintendent of Arizona State Prison; Robert J. Hirsh; Anthony Louis Tacon.

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# IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Division

No. 2163

STATE OF ARIZONA, APPELLEE

*v.*

ANTHONY LOUIS TACON, APPELLANT

Appeal from the Superior Court of Cochise County

The Honorable Lloyd C. Helm, Judge
Cause No. 7406

AFFIRMED.

GARY K. NELSON, Attorney General, Phoenix,
By Carl Waag, Former Assistant Attorney General
Paul Prato, Assistant Attorney General
Attorneys for Appellee.

ROBERT J. HIRSH, *Tucson,*
Attorney for Appellant.

UDALL, Justice:

Defendant, Anthony Louis Tacon, was found guilty by a jury of the unlawful sale of marijuana and was sentenced to a term of from 5 to 5½ years in prison. He appeals from the conviction and sentence. For the reasons advanced below, the judgment of the trial court is affirmed.

Defendant was arrested and charged with the unlawful sale of marijuana on February 24, 1969, at which time he was in the U.S. Army and was stationed at Fort Huachuca. Trial was set for April 22, 1969, but was continued at the request of the defendant and was not actually held until almost a year later, on March 31 and April 1, 1970. For reasons discussed in greater detail hereafter, defendant was not present at the time

set for trial and the trial was conducted in his absence. We shall consider defendant's arguments in the order presented.

I. WAIVER OF RIGHT TO BE PRESENT

Tacon argues that the evidence in the record is insufficient to show that his absence from the trial was voluntary and that he, therefore, cannot be said to have made a knowing and intelligent waiver of his right to confrontation and to be present at the trial of his case.

The United States Supreme Court has held that a defendant may, by consent or misconduct, give up the right to be present at his trial. *Illinois* v. *Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970); *Snyder* v. *Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *Diaz* v. *United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912).

Rule 43 of the Federal Rules of Criminal Procedure provides that in prosecutions for offenses not punishable by death, the defendant's voluntary absence, after the trial has been commenced in his presence, shall not prevent continuance of the trial, to and including the return of the verdict.

Rule 231 of our Rules of Criminal Procedure, 17 A.R.S., provides as follows:

"Rule 231. *Proceedings at which presence of defendant required in felony prosecution; exception*

A. In a prosecution for a felony the defendant shall be present:

1. At arraignment.
2. When a plea of guilty is made.
3. At the calling, examination, challenging, impaneling and swearing of the jury.
4. At all proceedings before the court when the jury is present.
5. When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.
6. At a view by the jury.

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7. At the rendition of the verdict.

B. *If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders.*" (Emphasis added.)

Under Rule 231, then, a trial may be conducted in the defendant's absence if his absence is voluntary. In order for a defendant to make a knowing and intelligent waiver of his right to be present at the trial, he must be aware that the trial will proceed without him if he fails to appear. *State of Arizona* v. *Hunt*, 408 F.2d 1086 (6th Cir. 1969); *State* v. *Taylor*, 104 Ariz. 264, 451 P.2d 312 (1969).

In the instant case, trial was originally set for April 22, 1969, but was continued at the request of the defendant and was not actually held until almost a year later, on March 31 and April 1, 1970. Defendant in the interim had been discharged from the U.S. Army in December, 1969. After leaving a forwarding address with his attorney, James D. Whitney, Tacon returned to New York City. On March 2, 1970, the trial court set March 31, 1970, as the date on which Tacon's trial was to begin. On March 3rd, Tacon's attorney sent a letter to Tacon advising him that his trial had been set for March 31st and that it would probably not be postponed under any circumstances. Whitney asked Tacon to answer the letter as soon as possible and to plan on being back in Arizona at least one week prior to trial so that the case could be properly prepared. When he received no word from Tacon, the attorney sent a second letter on March 18th. Still no reply was forthcoming, so the attorney sent a telegram on March 24th, stating that the judge would proceed with the trial on March 31st whether Tacon was present or not, and asking Tacon to contact him immediately.

On the morning of March 30th, the attorney received a phone call from Tacon. He did not say where he was calling from. Whitney told Tacon that the court would proceed with the trial whether or not Tacon appeared. Tacon replied he would attempt to make it but was short of funds and did not have sufficient money for transportation.

The next day, March 31, was the date set for trial. The trial judge met with counsel in chambers for a hearing as to defendant's absence. He reviewed the posture of the case and questioned defense counsel as to attempts made to contact Tacon. He then pointed out that the county had been put to considerable expense in bringing a witness for the state, along with two Federal marshalls, from the Federal reformatory at El Reno, Oklahoma, where the witness was incarcerated. At the conclusion of the hearing the trial court asked Tacon's attorney to check with his office and around the courthouse to see whether the defendant had perhaps arrived. A few minutes later Whitney reported back that Tacon was not present and no word had been received from him. The trial court ordered the matter to proceed to trial in the absence of the defendant.

Sometime during the first day of trial the defendant's mother, who lived in Miami, Florida, called Whitney's office and indicated that she had been unable to contact the defendant but that she would attempt to do so and would call back later that night. She never called back, but early the following morning an attorney in Miami called Whitney's office and indicated that the defendant could be present the next morning (April 2nd). Whitney attempted to return the call but the Miami lawyer was out of his office.

Later that same morning (April 1st, the second day of trial), the court met in chambers with counsel and Tacon's attorney reported the above developments and made a motion for a continuance of one day so that Tacon could be present to testify. The court denied the motion, stating that the defendant had been given more than sufficient time to inform the court of his ability or inability to be present and that under the circumstances Tacon's absence must be considered to be voluntary. Trial then was resumed before the jury and concluded the same day.

Defendant Tacon arrived in Arizona late in the evening of the next day, April 2nd, and he contacted Whitney the following morning. Together they went to the authorities on April 3rd and Tacon turned himself in.

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On May 4, 1970, a hearing was held at which defendant Tacon testified as to why he had failed to be present for his trial. He stated that on March 6th or 7th he received the letter from his attorney, dated March 3rd, informing him of the date of trial and of the need to be present. He said that he did not receive the letter sent by his attorney on March 18th until a day or so before he left for Arizona, and that the delay was apparently caused by the mail strike in New York City. He said he never received the telegram sent by his attorney on March 24th; the county attorney varified this statement by obtaining a confirmation from Western Union that its New York office had never received the telegram.

From the above it is apparent that Tacon received only one item of correspondence informing him of the trial date—the letter sent by his attorney on March 3rd. However, he testified that from that letter he understood that the trial was set for March 31st, and that the trial would proceed without him if he failed to appear. He stated that at the time he received the letter from his attorney he was without funds and had no means of financing a trip to Arizona for the trial. Under these circumstances, he felt that it would do little good to call his attorney since he would not be able to make it to the trial anyway. He said he could have asked for assistance from his family in Miami but that he had never told them about his getting in trouble and did not want to do so because of the embarrassment it would cause them. His mother had learned of his situation only because a third party had informed her of it. Tacon concluded his testimony by stating that it was his intention to get to the trial but that he just could not get the money together soon enough. At the conclusion of the hearing, the judge told the defendant that he was not impressed by Tacon's expressed intentions, that he could not believe them, and that he did not see any justification or excuse for Tacon's conduct.

Once a defendant's knowledge of the trial date is shown, the defendant has the burden of persuading the court that his absence was not voluntary. *State* v.

*Taylor, supra*, 104 Ariz. 264 at 266, 451 P.2d 312 at 314. From the foregoing, it is obvious that Tacon failed to persuade the trial court; and we shall not presume to "second guess" the trial judge since he heard the testimony, observed the demeanor of the witness, and saw the matter in the context of the surrounding circumstances.

The defendant's own testimony clearly shows he was aware that the trial was set for March 31st and that the trial would proceed without him if he failed to appear. The trial court was of the opinion that Tacon's absence was voluntary and there is substantial evidence in the record to support that opinion. Under these circumstances, we hold that Tacon's absence from his trial constituted a knowing and intelligent waiver of his right to be present at the trial and that the trial court, therefore, did not err in proceeding with the trial in his absence.

## II. Denial of Motion for Continuance

Defendant argues that the trial judge abused his discretion when he denied defense counsel's motion for a continuance of one day so as to enable the defendant to be present and to testify in his own behalf.

As noted earlier in this opinion, the trial court met with counsel in chambers on the morning of the second day of trial (April 1st), to determine whether any word had been received from Tacon which would change the complexion of the case. Tacon's attorney mentioned the calls he had received from Tacon's mother and from the attorney in Miami indicating that Tacon could be present the next morning (April 2nd). He made a motion for a continuance of one day so that Tacon could be present to testify. The trial judge denied the motion for continuance, indicating some doubt as to whether Tacon would actually appear, stating that the defendant had been given more than sufficient time to inform the court of his ability or inability to be present and that, under the circumstances, Tacon's absence must be considered to be voluntary. Trial was then resumed before the jury and was concluded the same day.

The grant or denial of a continuance is a matter of discretion with the trial court, and an appellate court will not interfere with the action of the trial court unless an abuse of discretion is clearly shown. *State* v. *George*, 100 Ariz. 350, 414 P.2d 730 (1966); *State* v. *Reyes*, 99 Ariz. 257, 408 P.2d 400 (1965). In the instant case the defendant has failed to show an abuse of discretion by the trial court.

At the time the motion for continuance was made, the trial judge had to exercise his judgment, based on the information available to him at that time, as to the probability that Tacon would actually be present the next morning. The trial judge denied the motion and the developments thereafter show that he exercised sound judgment in so ruling on the motion.

We accordingly hold that the trial judge did not abuse his discretion when he denied the motion for continuance.

## III. Evidence of Other Crimes

Defendant argues that the trial court erred in allowing the state to present evidence of several other crimes allegedly committed by the defendant which defendant asserts are unrelated to the offense for which he was then being tried. Specifically, the defendant objects to the admission into evidence of certain portions of the signed confession which he gave the police [1] and of certain portions of the testimony of Michael Kleweno, a witness for the state, who testified that defendant Tacon sold him two "lids" of marijuana on February 1, 1969.

The evidence indicates that Tacon purchased a "brick" of marijuana on or about January 31, 1969, took it to his home where he cut it up into 16 "lids", and then sold it to several different buyers on February 1 and 2, 1969.

[1] Prior to the admission of any testimony regarding Tacon's confession, the trial court held a voluntariness hearing out of the presence of the jury, at the conclusion of which the court made a finding that the defendant had been properly informed of his rights and that the confession was freely and voluntarily made. Testimony was then given before the jury by the police officer who received the confession as to the circumstances under which it was given, and the signed statement was read to the jury.

Tacon objects to all references made to transactions in marijuana other than those relating strictly to the sale of the two "lids" of marijuana to Kleweno on February 1, 1969. He contends that the other references are totally extraneous and immaterial to the offense with which he was charged. We cannot agree. We have consistently held that it is proper to admit evidence of recent acts or crimes of the accused committed by the same means or in a similar manner before or after the commission of the crime charged, and such are provable for the purpose of showing motive, intent, absence of mistake or accident, identity, or a common scheme or plan. *State* v. *Turner*, 104 Ariz. 469, 455 P.2d 443 (1969); *State* v. *Finley*, 85 Ariz. 327, 338 P.2d 790 (1959); *State* v. *Byrd*, 62 Ariz. 24, 152 P.2d 669 (1944). Also, evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. *State* v. *Mahoney*, 106 Ariz. 297, 475 P.2d 479 (1970); *State* v. *Villavicencio*, 95 Ariz. 199, 388 P.2d 245 (1964).

In the instant case, the evidence complained of by defendant tends to show the intent of the defendant to purchase a quantity of marijuana, cut it up into smaller quantities, and sell it to other persons. The evidence, therefore, tends to show a common scheme or plan and is so blended with the crime of which defendant was accused that proof of one incidentally involves the other or explains the circumstances of the crime. Under these circumstances, we hold that the trial court was eminently correct in admitting it into evidence.

For the reasons advanced above, the judgment of the trial court is affirmed.

JESSE A. UDALL
Justice

CONCURRING:

FRED C. STRUCKMEYER, JR., Chief Justice

LORNA E. LOCKWOOD, Justice

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SUPREME COURT
STATE OF ARIZONA

PHOENIX

85007

October 27, 1971

Supreme Court
No. 2163

Cochise County
No. 7406

STATE OF ARIZONA, APPELLEE

*v.*

ANTHONY L. TACON, APPELLANT

The following action was taken by the Supreme Court of the State of Arizona on October 27, 1971, in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing—DENIED."

Certified copy of Order Affirming Judgment issued this date.

CLIFFORD H. WARD
Clerk
By MARY ANN HOPKINS
Deputy Clerk

TO:

Robert J. Hirsh, Esq., Messing, Hirsh & Franklin, 509 Transamerica Building, Tucson 85701
Hon. Gary K. Nelson, Attorney General, 159 State Capitol, Phoenix 85007
Richard J. Riley, Esq., Cochise County Attorney, P.O. Box 20, Bisbee 85603
West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102
Anthony L. Tacon, Box B, Arizona State Prison, Florence 85232

231 (17 A.R.S. —— 1956)

"Rule 231. Proceedings at which presence of defendant required in felony prosecution; exceception

A. In a prosecution for a felony the defendant shall be present:

1. At arraignment.
2. When a plea of guilty is made.
3. At the calling, examination, challenging, impaneling and swearing of the jury.
4. At all proceedings before the court when the jury is present.
5. When evidence is addressed to the court out of the present of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.
6. At a view by the jury.
7. At the rendition of the verdict.

B. If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders."

# SUPREME COURT OF THE UNITED STATES

## No. 71-6060

ANTHONY LOUIS TACON, PETITIONER

*v.*

ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Arizona.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for a writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 12, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE, 1972 471999 12

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Supreme Court, U. S.
FILED
AUG 16 1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6060

ANTHONY LOUIS TACON,

*Petitioner,*

v.

STATE OF ARIZONA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPRME COURT
OF THE STATE OF ARIZONA

## BRIEF FOR PETITIONER

PETITION NOT PRINTED
RESPONSE NOT PRINTED

ROBERT J. HIRSH, ESQ.
509 Transamerica Building
Tucson, Arizona 85701

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-6060

---

ANTHONY LOUIS TACON,

*Petitioner,*

v.

STATE OF ARIZONA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPRME COURT
OF THE STATE OF ARIZONA

---

## BRIEF FOR PETITIONER

---

### OPINION BELOW

The opinion of the Arizona Supreme Court (App. 53-60) is reported at 107 Ariz. 353, 488 P.2d 973 (1971).

## JURISDICTION

The order of the Supreme Court of the State of Arizona, entered on September 23, 1971 (App. 51), was made final by the order of the Supreme Court of the State of Arizona, denying petitioner's motion for rehearing (App. 61). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

I. Can a felony defendant be tried completely in absentia?

II. Can a felony defendant be held to have voluntarily waived his right to be present at his trial without a hearing to determine the issue of voluntariness and an express finding by the trial court on that issue?

III. Can a felony defendant be deprived of his right to be present at the trial of his case because he is too impoverished to afford travel expenses to the site of the trial?

IV. Did the State of Arizona establish a knowing and intelligent waiver of petitioner's right to be present at his trial in this case?

## CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Article IV, Section 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony or other Crime, who shall flee from Justice and be found in another State, shall on Demand of the executive Author-

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ity of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 231:

"Proceedings at which presence of defendant required in felony prosecution; exception

A. In a prosecution for a felony, the defendant shall be present:

1. At arraignment.
2. When a plea of guilty is made.
3. At the calling, examination, challenging, impaneling, and swearing of the jury.
4. At all proceedings before the court when the jury is present.
5. When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.
6. At a view by the jury.
7. At the rendition of the verdict.

B. If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders."

## STATEMENT

Petitioner, Anthony Louis Tacon, then a 20 year old (App. 27), married serviceman, without any previous criminal record, who had not completed high school (App. 11), was arrested and charged on February 24, 1969, with the unlawful sale of marijuana, at which time he was in the U.S. Army and stationed at Fort Huachuca,

Arizona (App. 53). At the request of defense counsel, the trial date was continued from April 22, 1969, and trial was not held until almost a year later (App. 30-31; 53). In the interim, petitioner was discharged from the Army in December, 1969 (App. 9). Petitioner called his court-appointed attorney, Mr. James Whitney of Bisbee, Arizona, and told Mr. Whitney of petitioner's discharge from the service, of his intention to return to his home in New York City, and furnished a New York forwarding address (that of his mother-in-law) (App. 32). At that time both the petitioner and his court-appointed attorney believed that petitioner was free to leave the jurisdiction. (App. 10-11; 31-32). Petitioner then returned to New York City (App. 10). Thereafter, the trial court set March 31, 1970, as the date on which trial was to begin.

On March 3, 1970, petitioner's attorney sent petitioner a letter advising him that his trial had been set for March 31st and that it would probably not be postponed under any circumstances, and requesting petitioner to reply as soon as possible and to plan on being back in Arizona at least one week prior to trial so that the case could be properly prepared (App. 4). Petitioner received this letter on March 6th or 7th (App. 12-13). At the time he was without funds to finance a trip to Arizona and felt that it would do little good to call his attorney immediately (App. 14). He hoped to obtain the needed funds in time to get to Arizona for trial. Thereafter, petitioner attempted to obtain the money needed to return to Arizona (App. 12-14; 24-25). Petitioner could have asked for assistance from his mother in Miami, Florida, but he had never told her about his getting into trouble and did not want to do so because of the embarrassment it would cause (App. 12).

Having received no word from petitioner, his attorney sent a second letter on March 18th, in which he indicated that it might be possible to enter a plea of guilty to a reduced charge of possession of marijuana and that the reduced charge might be treated as a misdemeanor App. 4). However, due to a mail strike in New York City, the letter was delayed and petitioner did not receive it until the evening of April 1st, after his trial had ended (App. 26). On March 24th, still not having heard from petitioner, petitioner's attorney sent a telegram, stating that the trial would proceed on March 31st whether petitioner was present or not, and asking that petitioner contact him immediately. However, the telegram was never received by Western Union's New York office and the petitioner never received it (App. 57). Thus, the only correspondence which the petitioner received prior to trial advising him of the trial date was the letter of March 3rd (App. 57).

Finding himself unable to obtain the funds necessary to return to Arizona, petitioner tried unsuccessfully to reach his attorney by telephone the Saturday before trial, March 28th (App. 5; 27-28). On the morning of Monday, March 30th, petitioner did reach his attorney by telephone. Mr. Whitney, the attorney, told petitioner that the court would proceed with the trial whether petitioner was present or not. Petitioner replied that he would attempt to make it, but was short of funds and did not have sufficient money for transportation. Petitioner asked his attorney to explain this to the judge (App. 34; 41).

The next day, March 31, was the date set for trial. The trial judge met with counsel in chambers for a hearing as to petitioner's absence. The judge pointed out that the county had been put to considerable expense in bringing

a witness, along with two federal marshals, from the federal reformatory at El Reno, Oklahoma, where the witness was incarcerated (App. 2). At the conclusion of the hearing the trial court asked petitioner's attorney to check with his office and around the courthouse to see whether petitioner had perhaps arrived (App. 5-6). A few minutes later, petitioner's attorney reported that petitioner was not present and no word had been received from him. The trial court ordered the matter to proceed to trial in the absence of the defendant (App. 6).

At about the time the trial began, petitioner's mother, living in Miami, Florida, had found out about the criminal charge pending against her son from petitioner's mother-in-law (App. 14). Sometime during the first day of trial, petitioner's mother called petitioner's attorney's office and indicated that she had been unable to contact petitioner, but that she would attempt to do so and would call back later that night. She never called back, but early the following morning, an attorney in Miami called petitioner's attorney's office and indicated that the petitioner could be present the next morning, April 2nd (App. 6).

Later that same morning (April 1st, the second day of trial), the court met in chambers with counsel. Petitioner's attorney reported the telephone calls from petitioner's mother and the Miami attorney, and moved for a continuance of one day so that petitioner could be present to testify (App. 6). The court denied the motion, stating that the petitioner had been given more than sufficient time to inform the court of his ability or inability to be present and that under the circumstances petitioner's absence must be considered to be voluntary (App. 7-8). Trial then resumed and was concluded the

same day. No evidence or witnesses were presented for the defense. (Transcript of March 31 and April 1, 1970, at 162). After less than half an hour of deliberations, the jury reached a verdict of guilty. (Transcript of March 31 and April 1, 1970, at 195, 197). The offense in question is a serious one under Arizona law carrying penalties of up to five years to life imprisonment.

Having received money for transportation from his mother (App. 14-15), and although aware from his telephone conversation with his attorney on March 30th, that a bench warrant for his arrest had been issued, so that he faced the certainty of incarceration in jail if he returned (App. 15-16), petitioner returned to Arizona arriving late in the evening of the next day, April 2nd. He contacted his attorney the following morning (App. 16). Together they went to the authorities on April 3rd and petitioner turned himself in, and was promptly jailed.

Ten days later the petitioner was sentenced to not less than 5 nor more than 5½ years in the Arizona State Penitentiary (App. 53). Thereafter on May 4, 1970, a hearing was held in connection with an order by the trial court to show cause why the petitioner should not be punished for contempt by reason of his failure to appear for trial at the time and date set and scheduled. Petitioner's court-appointed attorney and petitioner testified as to the circumstances surrounding his absence. At the conclusion of the hearing, the judge told the petitioner that he was not impressed by the petitioner's expressed intentions, that he could not believe them, and that he did not see any justification or excuse for petitioner's conduct (App. 50). The court then took the matter under advisement (App. 50).

On appeal, in an opinion filed September 23, 1971, the Arizona Supreme Court held that, under Rule 231 of the Arizona Rules of Criminal Procedure, petitioner's absence from his entire trial constituted a knowing and intelligent waiver of his right to be present at the trial, and that the trial court, therefore, did not err in proceeding with the trial in his absence. The court reasoned that where a defendant's knowledge of the trial date is shown, the defendant has the burden of persuading the court that his absence was not voluntary (App. 57). And since the petitioner had this burden, and there was "substantial evidence in the record" supporting the trial court's determination of voluntariness, the Arizona Supreme Court stated that it would "not presume to 'second guess' the trial judge." (App. 58).

On October 27, 1971, the Arizona Supreme Court denied petitioner's motion for rehearing in the case and entered an order affirming the trial court's judgment (App. 61). A motion for leave to proceed in forma pauperis and a petition for writ of certiorari were granted June 12, 1971 (App. 63).

## SUMMARY OF ARGUMENTS

I. A felony defendant may not be tried completely in absentia. The right to be present, at least at the commencement of one's trial, must be recognized in order to safeguard against dilution of an accused's Sixth Amendment rights to complete and adequate cross-examination and effective assistance of counsel and his Fourteenth Amendment right to a fair trial. If tried completely in absentia, the accused is unable to assist in his own defense and provide information to counsel

which might otherwise aid the defense. The right to be present at one's trial is recognized, without exception, by international jurists and was so recognized in Anglo-American common law. Art. IV §2 of the Constitution, when read in conjunction with the Sixth and Fourteenth Amendments, can be construed as imposing a duty upon the states to see that a defendant is present for his trial.

II. A felony defendant cannot be held to have voluntarily waived his right to be present at his trial without a hearing to determine the issue of voluntariness and an express finding by the trial court on that issue. Arizona criminal procedure does not provide for a hearing to determine the voluntariness of one's absence from trial. Under this Court's decisions, a hearing is necessary where important rights are subject to forfeiture by a state procedure which by-passes the necessity of a hearing without compelling justification therefor. Since Arizona presumes waiver of the right to be present at trial if a criminal defendant knew of the trial date and does not show up for trial, a hearing is critical in order to rebut this presumption.

III. A felony defendant cannot be deprived of his right to be present at trial because he is too impoverished to afford travel expenses to the site of the trial. The record in this case shows that petitioner was unable to make it to the site of his trial in time to appear therein because of his financial condition. This Court has steadfastly held that a waiver of constitutional rights cannot be predicated on an individual's failure to exercise that right because of his impoverished condition.

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IV. The State of Arizona did not establish a knowing and intelligent waiver of petitioner's right to be present at his trial in this case. In Arizona a criminal defandant has the burden of proving his absence from trial was involuntary once it is shown that he knew of the trial date. This burden is a very difficult one. The Arizona Supreme Court's construction of "waiver" is in conflict with this Court's definition. There was no evidence in this case that petitioner voluntarily waived his right to be present at trial. Indeed, the uncontroverted evidence indicated exactly the opposite, *i.e.*, that petitioner did not voluntarily waive his right to be present at trial.

## ARGUMENT

### I.

### A FELONY DEFENDANT CANNOT BE TRIED COMPLETELY IN ABSENTIA

It is settled law in Arizona under *Arizona Rules of Criminal Procedure*, Rule 231, that a felony defendant may be tried completely in absentia if he "is voluntarily absent." *State v. Tacon*, 107 Ariz. 353, 488 P.2d 297 (1971); *State v. Taylor*, 104 Ariz. 264, 451 P.2d 312 (1969); *State v. Hunt*, 12 Ariz. App. 410, 471 P.2d 303 (1970). The Arizona Supreme Court has conceded that:

> "Perhaps the orderly administration of justice would be better served by requiring the presence of the defendant at the beginning of his trial." *State v. Taylor*, 104 Ariz. 264, 266, 451 P.2d 312, 314 (1969).

But, in fact, in Arizona the defendant need only be present at his arraignment, entering a guilty plea, and

sentencing. *State v. Davis*, 105 Ariz. 498, 467 P.2d 743 (1970); *Arizona Rules of Criminal Procedure*, Rule 231(B).

This Court has held that the trial of a felony charge cannot be commenced in the absence of the accused and that his right to be present at the commencement of trial cannot be waived either by himself or by his counsel. *Lewis v. United States*, 146 U.S. 370 (1892); *Hopt v. Utah*, 110 U.S. 574 (1884). And this Court has observed that in felony cases the right to be present at trial is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 233 U.S. 442, 455 (1912). *See also, Ingram v. Peyton*, 367 F.2d 933, 937 (4th Cir. 1966); *People v. Anderson*, 6 Cal. App. 3d 364, 85 Cal. Rptr. 669 (1970).

Although there is no express language in the Constitution compelling a criminal defendant's presence at trial, this right must, of necessity, be implied in order to safeguard against dilution of his Sixth and Fourteenth Amendment rights.

It is axiomatic that without a criminal defendant's presence at trial, there can be no confrontation of the witnesses against him. Since the word "confrontation" is generally defined to mean "face-to-face" meeting, the drafters of the Sixth Amendment must have presumed a defendant's presence at trial. *See Black's Law Dictionary* 372 (4th Ed. 1951). Indeed, use of the word "confrontation" by the drafters may very well have been in recognition of the common law then-existing, since the right to be present at one's trial was well-recognized by Anglo-American common law at the time the Sixth Amendment was drafted. *See* Golden, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*,

16 *Colum. L. Rev.* 18, 18-21 (1916); see also, III Holdsworth, *A History of English Law* 604-07 (5th Ed. 1942); Plucknett, *A Concise History of the Common Law* 430-31 (5th Ed. 1956).

In *Illinois v. Allen*, 397 U.S. 337, 338, *rehearing denied*, 398 U.S. 915 (1970), the right to be present at every stage of one's trial was labelled "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause." *See also, United States v. Hayman*, 342 U.S. 205 (1952) (in a "criminal trial where the guilt of the defendant is in issue . . . his presence is required by the Sixth Amendment.")

The Sixth Amendment also guarantees to a criminal defendant "the right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel," *United States v. Wade*, 388 U.S. 218, 227 (1967); *see Pointer v. Texas*, 380 U.S. 400, 407 (1965) (cross-examination must be "complete and adequate"), and the right "to have compulsory process for obtaining witnesses in his favor." *Washington v. Texas*, 388 U.S. 14, 18 (1967). When there is a trial of a criminal defendant completely in absentia, each of these rights are jeopardized.

If tried completely in absentia, by definition the defendant is unable to assist in his own defense. Without the accused's presence, there is no opportunity of consultation with counsel during the course of the proceedings. Such consultation may be critical in a given case to supply information to counsel which is known by the accused about a particular witness or about the content of his testimony and of which counsel is not aware. Furthermore, it is inevitable that in many cases counsel will be unable to communicate with the defendant while preparing his defense if the defendant's

whereabouts are unknown. Under such circumstances, witnesses which might otherwise aid in the defense may be unknown to counsel and hence not called to testify and counsel will be forced to speculate on the defenses which should be raised and the scope and points of cross-examination. In short, the effectiveness of counsel may be severely undermined by the defendant's absence and the trial rendered a sham.

One court has noted that where, as here, the defendant is the only defense witness and because of his absence is unable to testify in his own behalf, even the continuation of trial is tantamount to a guilty plea. *Wade v. United States*, 441 F.2d 1046, 1049 (D.C. Cir. 1971); *United States v. McPherson*, 421 F.2d 1127, 1130 (D.C. Cir. 1969). Furthermore, the defendant's absence leads to the natural conclusion that "the defendant has fled because of consciousness of guilt." J. Moore, *Federal Practice* § 43.02 (2d Ed. 1970). Stated otherwise, trial in absentia is a hallmark of tyranny. *See Illinois v. Allen*, 297 U.S. 337, 347-48, *rehearing denied*, 398 U.S. 915 (1970) (Brennan, J., concurring); *Note, The Supreme Court, 1969 Term*, 84 *Harv. L. Rev.* 30, 98 (1970). It makes a mockery of the procedural safeguards aimed at protecting individual liberty and purifying the fact-finding process. It smacks of:

> "the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of providence to save the innocent whenever it was presumptuously required." 4 W. Blackstone, *Commentaries*, 338.

Ironically, the Constitution and the State of Arizona would not permit trial if the defendant, although physically present, were not mentally competent to assist

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in his own defense. *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960); *Wilson v. United States*, 391 F.2d 460, 463 (D.C. Cir. 1968); *Arizona Revised Statutes Annotated* §13-1621 (Supp. 1971-72); *Ariz. R. Crim. Pro.* 250. Yet, if the defendant is physically absent, Arizona recognizes no restraint against proceeding to try him.

There would have been no question in the Eighteenth or Nineteenth Centuries but that a trial in absentia for a felony was abhorrent to Anglo-American justice. *See, e.g., United States v. Shelton*, 6 F.2d 897 (E.D. La. 1925); *Noell v. Commonwealth*, 135 Va. 600, 608-09, 115 S.E. 679-81 (1923); Golden, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 *Colum. L. Rev.* 18, 18-20 (1916). Clearly, Arizona would not have permitted such a trial for prior to enactment of what has become *Ariz. R. Crim. Pro.* 231, Arizona followed the rule stated in *Arizona Revised Code of 1928*, §5028:

> "If the prosecution is for a felony, the defendant must be personally present at the trial . . ."

In D. Murray, *The Power to Expel a Criminal Defendant from His Own Trial: A Comparative View*, 36 *U. Colo. L. Rev.* 171, 185-86 (1964), two noteworthy observations are made. First, the International Commission of Jurists have enunciated without exception the rule that an accused has the right to be present at his trial. *International Commission of Jurists, The Rule of Law in a Free Society* 10, 126, 250-52 (1959). Second, this same right may also be discerned in Article 6 of the *Inter-American Draft Convention on Human Rights*, 4 *J. Int'l. Comm'n. Jurists* 164 (1962) and Article 6 of the *European Convention on Human Rights*, 4 *J. Int'l. Comm'n. Jurists* 131 (1962).

In contrast to Rule 231 of the *Arizona Rules of Criminal Procedure*, the rule governing criminal proceedings in federal courts safeguards against the abuses of constitutional rights inherent in a trial completely in absentia. *Fed. R. Crim. Pro.* 43(b) requires, at a minimum, that a defendant charged with a felony be present at the commencement of trial. This requirement assures that the defendant has been afforded the opportunity to consult with counsel and inform him of witnesses and other information potentially helpful to the defense. It also precludes the inference from complete absence that the defendant has fled the jurisdiction. Once this requirement has been met the defendant may, by his disruptive conduct, *Illinois v. Allen*, 397 U.S. 337 *rehearing denied*, 398 U.S. 915 (1970), his express waiver, or voluntary self-removal after trial commences, waive his right to be present as the trial continues. *Diaz v. United States*, 223 U.S. 442 (1912). And he may be absent during some stage of the proceedings where his absence would not influence the court or jury and his personal assistance in his defense is unnecessary. *Snyder v. Massachusetts*, 291 U.S. 97, *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1934); *Dowdell v. United States*, 221 U.S. 325 (1911).

The Constitution of the United States, Article IV, Section 2, grants to every state the power to demand and obtain return from any other state of persons charged with a crime by the demanding state. Had the Constitution intended this provision to merely guarantee the availability of a defendant for imposition and execution of sentence, the provision could have been much more narrowly drawn and construed. *See Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917); *Appleyard v. Massachusetts*, 203 U.S. 222 (1906). The

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provision applies to any person *charged* with a crime, and not merely to those convicted of a crime or brought to trial for a crime. It is clear that the provision sought to guarantee access to the defendant in order to bring him to trial. *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132-33 (1917).

Concomitant with the extradition power and read as it must be in the context of the right to be present at trial guaranteed by the Due Process Clause of the Fourteenth Amendment and by the Sixth Amendment, is the responsibility of each state to see that a felony defendant is present for the commencement of his trial or to make some effort to procure his presence.

Petitioner respectfully submits that a felony defendant's presence is constitutionally required, at the very minimum, at the commencement of trial and that *Ariz. R. Crim. Pro.* 231 is, therefore unconstitutional.

II.

**A FELONY DEFENDANT CANNOT BE HELD TO HAVE VOLUNTARILY WAIVED HIS RIGHT TO BE PRESENT AT HIS TRIAL WITHOUT A HEARING TO DETERMINE THE ISSUE OF VOLUNTARINESS AND AN EXPRESS FINDING BY THE TRIAL COURT ON THAT ISSUE.**

Following petitioner's sentencing, a hearing was held by the trial court on May 4, 1970, to determine whether petitioner should be punished for contempt of court by reason of his failure to appear for trial at the time and date set and scheduled. Although some facts regarding the petitioner's absence during his trial were elicited at that hearing, the purpose of the hearing was not to

determine the voluntariness of his absence from trial (indeed he had been sentenced weeks before the hearing) but simply to determine whether he should be held in contempt. Moreover, the trial judge at this hearing never made an express finding as to whether or not petitioner voluntarily absented himself from his trial. Instead, the court took the matters related to its contempt allegation under advisement. (App. 48-50).

The only recorded statement that the trial court had found petitioner's absence from trial "voluntary" was a conclusion to that effect when confronted with a motion to stay termination of trial on April 1, 1970 (App. 7-8). Other than this conclusory statement, the only indication of the trial court's opinion on the matter came at the close of the hearing on the contempt charge on May 4, 1970. After the court stated it would take the contempt charge under advisement (App. 49), petitioner made a statement to the court, which concluded:

> "Of course, the Court has no way of knowing, actually, how I really did feel, but I tell the Court that I had—that I had no intentions of not coming." (App. 50).

The Court replied:

> "I might say this, Mr. Tacon, the Court is impressed not a bit by your expressed intentions in this case. I don't believe any of them, and I just can't see any justification or excuse for your conduct. That's all." (App. 50).

The Arizona Supreme Court, instead of making actual findings or remanding for an evidentiary hearing and findings, relied on the aforementioned parenthetical comments in holding that it would not presume to "second guess" the trial court's conclusion since there was "substantial evidence" to support it. 107 Ariz. at 356-57, 488 P.2d at 976-77 (App. 58).

In order to hold that a defendant has voluntarily waived his right to be present at trial, there must be an evidentiary hearing to determine the issue of voluntariness and an express finding by the trial court on that issue. *Cf. State v. Taylor*, 104 Ariz. 264, 265, 451 P.2d 312, 313 (1969). Where a waiver of important Constitutional rights is involved, such a waiver cannot be presumed from a silent record. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *see United States v. McPherson*, 421 F.2d 1127 (D.C. Cir. 1969); *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir. 1968); *Cross v. United States*, 325 F.2d 629, 631-33 (D.C. Cir. 1963); *United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968). Express findings of fact not only facilitate appellate review but also help guard against judicial vindictiveness, *North Carolina v. Pearce*, 394 U.S. 711, 726 (1969), thereby encouraging an absentee defendant's voluntary return to the trial jurisdiction.

This Court has steadfastly held that where, as here, important rights are at stake, due process demands a fair hearing resulting in findings of fact and conclusions of law by an impartial magistrate before a state can (without compelling justification for its procedure omitting a hearing) cause forfeiture of those rights. *E.g. Fuentes v. Shevin*, 40 U.S.L.W. 4692 (U.S. June 12, 1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1968).

A hearing is particularly necessary to protect Fourteenth Amendment rights where, as here, an irrational presumption is left unattacked by the procedure which omits a hearing. *See Stanley v. Illinois*, 40 U.S.L.W. 4371 (U.S. April 3, 1972). Under the

Arizona Supreme Court's construction of *Ariz. R. Crim. Pro.* 231(b) once a criminal defendant's knowledge of the trial date is shown, he has the burden of proving his absence from trial was not voluntary. *State v. Tacon*, 107 Ariz. 353, 356, 488 P.2d 973, 976 (1971) (App. 57). In other words, if a defendant knows of his trial date, waiver will be presumed unless he can prove otherwise. Yet there is no procedure in Arizona for an evidentiary hearing to make a record on this issue. In effect, a criminal defendant is without means of proving he has not waived his right to be present at trial.

Petitioner respectfully submits that the procedure followed in this case, which precluded him from having a fair hearing on the issue regarding the voluntariness of his absence from trial before an impartial magistrate resulting in express findings of fact and conclusions, denied him due process of law.

III.

**A FELONY DEFENDANT CANNOT BE DEPRIVED OF HIS RIGHT TO BE PRESENT AT THE TRIAL OF HIS CASE BECAUSE HE IS TOO IMPOVERISHED TO AFFORD TRAVEL EXPENSES TO THE SITE OF THE TRIAL.**

The record in this case shows that petitioner told his attorney that he intended to appear for his trial but that he did not have sufficient money for transportation. He asked his attorney to explain this to the judge. (App. 14; 34). And, indeed, as soon as funds for travel were made available to him, he made his way to the site of the trial (well over 2000 miles from his home.) (App. 15; 34).

The fact that petitioner was ultimately able to obtain funds for transportation from his mother and the fact that he had not sought assistance from her because he wanted to keep the fact of the pending criminal charges from her (App. 12-13) should not negate his own impoverished circumstances. Petitioner at the time of trial was over 21 years old (App. 27) and had incurred substantial expenses as a result of a recent separation from his wife. (App. 13). There is no rule of law requiring an adult, non-dependent, married individual to solicit funds from relatives outside his own household in order to preserve his right to be present at his own trial, no more than that is required to preserve his right to counsel.

A waiver of constitutional rights cannot be predicated on an individual's failure to exercise that right because of his impoverished circumstances. *Gideon v. Wainwright,* 372 U.S. 335 (1963). This Court has held steadfast in opposing monetary barriers to the poor's access to appellate relief. *E.g., Mayer v. Chicago,* 40 U.S.L.W. 4055 (U.S. Dec. 13, 1971); *Long. v. District Court of Iowa,* 385 U.S. 192 (1966); *Douglas v. California,* 372 U.S. 353 (1963); *Smith v. Bennett,* 365 U.S. 708 (1961); *Griffin v. Illinois,* 351 U.S. 12 (1956). It has refused to permit monetary bars to access to the courts where no remedy outside the judicial system was available. *Boddie v. Connecticut,* 401 U.S. 371 (1971). And, in general, this Court has opposed deprivation of liberty imposed solely because of a defendant's indigency. *Tate v. Short,* 401 U.S. 395 (1971); *Williams v. Illinois,* 399 U.S. 235 (1970). Now the State of Arizona would set a springe for the impecunious to prevent them from obtaining access to their own criminal trial. *See Greene v. Briggs,* 10 F. Cas. 1135 (No. 5, 764) (CCDRI 1852). And this it does

despite the fact that the State of Arizona has, and in this case had, alternatives available to protect its interests in bringing the indigent defendant to trial. U.S. Const. Art. IV, § 2; *Arizona Revised Statutes Annotated*, §§ 13-1301 to 13-1328 (1956); *New York Crim. Proced. Law* §§ 570.02 to 570.66 (McKinney 1971); 18 U.S.C. § 3182 (1964). And in addition to having the assistance of state investigative agencies in its efforts to bring the defendant to trial, the State of Arizona can request the assistance of federal agencies under 18 U.S.C.A. § 1073 (Supp. 1971).

## IV.

## THE STATE OF ARIZONA DID NOT ESTABLISH A KNOWING AND INTELLIGENT WAIVER OF PETITIONER'S RIGHT TO BE PRESENT AT HIS TRIAL IN THIS CASE.

Under *Ariz. R. Crim. Pro.* 231(b), a felony defendant may be tried in absentia if he is "voluntarily absent." In construing this provision, the Arizona Supreme Court held in this case that:

> "Once a defendant's knowledge of the trial date is shown, the defendant has the burden of persuading the court that his absence was not voluntary." 107 Ariz. at 356, 488 P.2d 976 (App. 57).

By placing on the defendant a burden of showing that he did not waive his right to be present, the Arizona Supreme Court departed from the long line of decisions in which this Court has held that every reasonable presumption must be indulged against the waiver of a Constitutional right. *E.g., Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Boykin v. Alabama*, 394 U.S. 238 (1969); *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966);

*Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). *See United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) (right to be present at a critical stage of trial is so basic that it cannot be treated as harmless error).

The burden of proving one's absence from trial was not voluntary is an onerous one indeed. The issue is necessarily subjective; the means of arguing one's own state of mind are limited. Frequently, the sole means of proving that one did not voluntarily waive his right to be present at trial will be his own declarations to the contrary. Under such circumstances, a defendant's chances of proving his involuntary absence are slight, since his credibility has already been purged by failing to show up for trial.

The difficulty inherent in this burden of proof is well-illustrated by the instant case. At the contempt hearing of May 4, 1971, petitioner explained his absence, which concluded:

> "Of course, the court has no way of knowing, actually, how I really did feel, but I tell the court that I had—that I had no intentions of not coming." (App. 50).

The Court replied:

> "I might say this, Mr. Tacon, the court is impressed not a bit by your expressed intentions in this case. I don't believe any of them and I just can't see any justification or excuse for your conduct. That's all." (App. 50).

When constitutional rights are involved, "waiver" is defined as "the intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1968). The Arizona Supreme Court's own statement of

the facts should have made it clear that there was no intentional relinquishment of petitioner's right to be present in this case:

> "From the above, it is apparent that Tacon received only one item of correspondence informing him of the trial date—the letter sent by his attorney on March 3rd. However, he testified that from that letter he understood that the trial was set for March 31st, and that the trial would proceed without him if he failed to appear. He stated that at the time he received the letter from his attorney he was without funds and had no means of financing a trip to Arizona for the trial. Under these circumstances, he felt that it would do little good to call his attorney since he would not be able to make it to the trial anyway. He said he could have asked for assistance from his family in Miami, but that he had never told them about his getting in trouble and did not want to do so because of the embarrassment it would cause them. His mother had learned of his situation only because a third party had informed her of it. Tacon concluded his testimony by stating that it was his intention to get to the trial but that he just could not get the money together soon enough." 107 Ariz. at 356, 488 P.2d at 976 (App. 57).

There is no evidence in the court's opinion or in the record in this case that petitioner did intend to relinquish his right to be present at his trial. The Arizona Supreme Court can only mean that once it is shown that a defendant knew of his trial date, merely showing that he was not present at his trial is sufficient to establish waiver of his right to be present. This conclusion is just as constitutionally offensive as would be presuming a valid waiver of the rights to silence and an attorney in an in-custody interrogation "simply from the silence of the

accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona,* 384 U.S. 436, 475 (1966).

Although there was some evidence in the Arizona Supreme Court's opinion in this case that the Court had also relied on the fact that petitioner knew that the trial would proceed in his absence, the Arizona Supreme Court has subsequently made it clear that this fact did not support its opinion. In *State v. Davis,*____Ariz.____, ____P.2d____(Ariz. Supreme Court, June 16, 1972), the Arizona Supreme Court explained:

> "Defendant argues . . . (b) that there is no proof that he knew that the trial could proceed in his absence.
>
> * * * * *
>
> With reference to (b) the following language [from *State v. Tacon*] lends some support to defendant's position: 'In order for a defendant to make a knowing and intelligent waiver of his right to be present at the trial, he must be aware that the trial will proceed without him if he fails to appear.'
>
> This was pure dictum and upon closer analysis the error in that statement is apparent. It is true that a waiver is a voluntary relinquishment of a known right and without knowledge of a right, there can be no waiver. But the right to try a defendant in absentia rests upon his waiver *of his known right to be present, not upon the (possibly unknown) court's right to try him while absent.* Here the defendant knew that he had a right to be present and has failed to show that he did not voluntarily elect to waive that right." (Emphasis original.)____Ariz.__, __, ____ P.2d____.

The Arizona Supreme Court's construction of "waiver" is untenable and totally at odds with this Court's construction. If a waiver must be "intelligently and understandingly" made, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), it cannot be seriously maintained that waiver does not demand a knowledge of the consequences of one's conduct. If the Arizona Supreme Court's construction of "waiver" is correct, the mandate in *Miranda v. Arizona, supra*, that an accused be warned that his statements can be used against him in a court of law must have been superfluous dictum.

Arizona provides for no procedure for a hearing whereby an absent defendant may explain the involuntariness of his absence. At an informal in camera hearing before trial, counsel for petitioner explained that he had been in contact with petitioner; that petitioner stated he would attempt to make it to trial; and that at the time of his conversation petitioner was without sufficient money for transportation (App. 5). The trial judge, noting that notice had been sent to petitioner of his trial date and that the State of Arizona had incurred expenses in obtaining the presence of its witnesses, decided to proceed with the trial. (App. 2-5). During the second day of trial, counsel for petitioner requested, by oral motion, to stay termination of trial on the grounds that petitioner's Florida attorney had contacted him and stated that petitioner could be present the following day to testify. (App. 6-7). The court denied the motion. (App. 7-8).

It was circumstantial that in this case petitioner was afforded, after trial, an opportunity to have recorded his explanation of his absence. No procedure for a post-trial hearing on such matters is provided for by Arizona law. Petitioner's explanatory testimony was recorded at a

hearing on contempt charges arising out of his absence at trial. There petitioner explained that he was in New York City at the time he received notice of the trial date; that he was without funds for transportation to Arizona at the time he received the notice; that he attempted to obtain the funds; that when he knew he would not be able to raise enough money in time he contacted his Arizona attorney and asked that he explain this to the judge and that he would continue to try and raise the money; and that as soon as he did raise the money, he immediately proceeded by plane to Arizona, arriving the day after his trial had ended. (App. 12-15). This testimony was uncontroverted. It was corroborated by his court–appointed trial attorney. (App. 34-36).

Although at this hearing the court noted that it felt that petitioner's conduct was without "justification or excuse" (App. 50), no findings were made on the issue of whether petitioner was voluntarily absent from trial. At this point, petitioner had already been sentenced and implicitly the trial judge had deemed the matter already closed by its earlier conclusions. (App. 8). On appeal, the Arizona Supreme Court, rather than making actual findings or remanding for an evidentiary hearing and findings, simply stated that it would not "second guess" the trial judge's opinion on the matter since there was "substantial evidence in the record to support it." 107 Ariz. at 356-57, 488 P.2d at 976-77 (App. 58).

Some attention must be paid to petitioner's ability and inclination to appear for trial. In this case, as soon as petitioner obtained the funds necessary to finance a trip to Arizona, he did, in fact, fly to Arizona, unfortunately arriving the day after the trial had concluded. Yet, because of the procedure followed in this case, this fact (which is perhaps the best evidence of petitioner's

intention not to waive his right to be present at trial) as well as the explanatory testimony given by petitioner at the contempt hearing of May 4, 1972, were not before the Court at the time it had apparently decided petitioner's absence was voluntary (App. 8).

Petitioner respectfully submits that he did not voluntarily waive his right to be present at trial and that the Arizona Supreme Court's conclusion to the contrary was erroneous.

## CONCLUSION

For the foregoing reasons, petitioner requests that this court rule that a felony defendant may not be tried completely in absentia without an express waiver of his right to be present at trial. Alternatively, petitioner requests that this Court rule that a felony defendant's conviction, decided at a trial conducted in his absence, be left to stand only after a voluntary waiver of his right to be present has been determined at a post-trial hearing with the defendant present, resulting in findings of fact and conclusions of law by an impartial magistrate.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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Supreme Court, U. S.
FILED
AUG 16 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

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NO. 71-6060

---

ANTHONY LOUIS TACON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

---

# BRIEF FOR THE RESPONDENT

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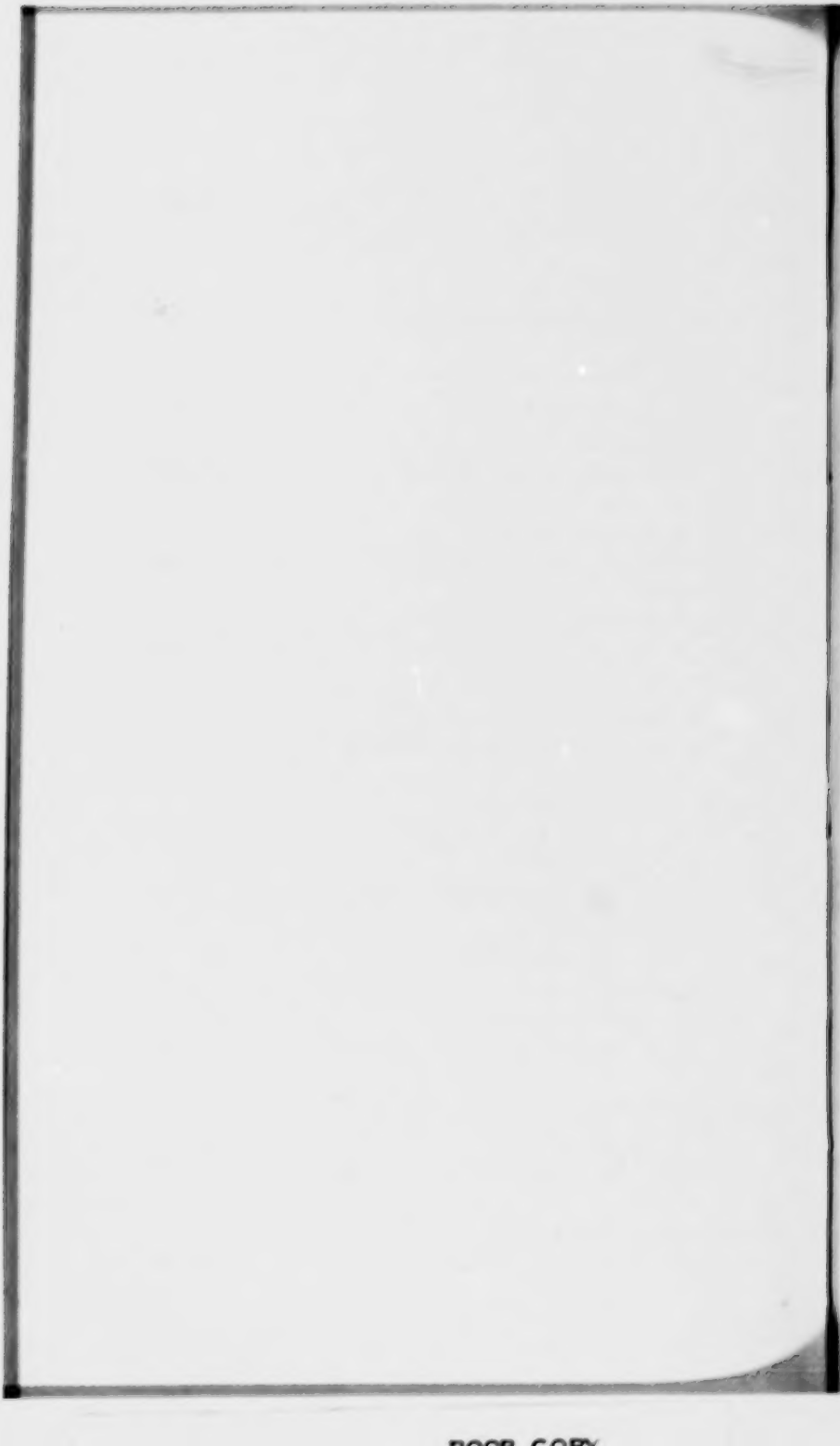

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

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NO. 71-6060

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ANTHONY LOUIS TACON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

---

# BRIEF FOR THE RESPONDENT

GARY K. NELSON
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of Arizona

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Assistant Attorney General

Attorneys for Respondent

## OPINION BELOW: JURISDICTION, CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The State of Arizona accepts Petitioner's presentation of these items.

## QUESTIONS PRESENTED

Respondent presents its own questions to frame the issues more exactly:

1. Can a defendant who is charged with a non-capital felony and who has waived his right to be present at trial be tried in absentia constitutionally?

2. Did the State Court hold an adequate hearing and make a proper finding on the issue of the voluntariness of Petitioner's waiver of his right to be present at trial?

3. When a defendant who has been released from custody without bond volun-

tarily absents himself from the jurisdiction of the State and later fails to appear for trial, knowing that the trial would proceed in his absence, is his later unsubstantiated claim of being too impoverished to afford travel expenses sufficient to upset the State Court's finding of voluntary absence and thus voluntary waiver of his right to be present at trial?

4. Petitioner's question four is necessarily included in the proper restatement of the question in 2 above.

STATEMENT OF THE CASE

Petitioner was a twenty-year old, married serviceman (App. p. 27) stationed at Ft. Huachuca, Arizona (App. p. 53) who had been in AWOL difficulties with the Service (App. p. 25-26). On February 24,

1969, he was arrested and charged with unlawful sale of marijuana (App. p. 53). He was arraigned in March, 1969 (App. p. 30), pleaded "not guilty" (App. p. 9), and trial was set for April 22, 1969. On April 21, 1969 (App. p. 28-29), at the request of defense counsel, the trial date was postponed. Petitioner was present in Court at that time (App. p. 28-29, fol. 42). At the time of his arrest, Petitioner was incarcerated and bond was set in the amount of $1,000. Upon the importuning of Petitioner's wife, the County Attorney moved the Court that Petitioner be released in the custody of his commanding officer at Ft. Huachuca, without bond and with his "orders flagged" (App. p. 9). The Court acquiesced and Petitioner was so discharged in

custody. Thereafter, Petitioner was discharged from the Army and, after notifying his attorney of his forwarding address (App. p. 42), he returned to New York City (App. p. 10). Subsequently, the trial court set March 31, 1970, as the date on which the trial was to begin. On March 3, 1970, Petitioner's attorney sent Petitioner a letter advising him that his trial had been set for March 31, requesting Petitioner to reply as soon as possible and to plan on being back in Arizona at least one week prior to trial. He also advised in this letter that the trial probably would not be postponed under any circumstances (App. p. 4). Petitioner received this letter on March 6 or 7 (App. p. 12-13) and understood that the trial would go on without

him if he did not appear (App. p. 27). Petitioner was then twenty-one years of age (App. p. 27). Petitioner made no attempt to contact his attorney until the Saturday before trial, March 28 (App. p. 5, 27, 28), at which time he was unsuccessful in telephoning him. The following Monday morning, March 30, the day before trial, Petitioner did reach his attorney by telephone. Mr. Whitney, the attorney, told Petitioner that the Court would proceed with the trial whether Petitioner was present or not. Petitioner told his attorney he would try to make it to trial but did not have the funds. Petitioner could have asked for financial assistance from his mother in Miami, Florida, but did not do so (App. p. 12). On the day of trial, March 31,

the Trial Judge met with Counsel in Chambers for a hearing as to Petitioner's absence. The Judge pointed out that the County had been put to considerable expense in bringing a witness, along with two federal marshals, from the Federal Reformatory at El Reno, Oklahoma (App. p. 2). At this hearing, the Judge was informed of the letter of March 3 from Petitioner's attorney to Petitioner and the phone call of the previous morning from Petitioner to his attorney. He was also informed that the attorney had sent a second letter to Petitioner, dated March 18, and a telegram, dated March 24. Only after the trial was it determined that the telegram had never been delivered and, at his contempt hearing, Petitioner claimed that he had not

received the letter of March 18 until the evening of April 1. After asking Petitioner's attorney to check with his office and around the Courthouse to see whether Petitioner had arrived (App. p. 5-6), the trial court ordered the matter to proceed to trial in the absence of the defendant (App. p. 6). At about the time trial began, Petitioner's mother, living in Miami, Florida, found out about the matter from Petitioner's mother-in-law (App. p. 14). Sometime during the first day of trial, Petitioner's mother called Petitioner's attorney's office and indicated that she had been unable to contact Petitioner, but that she would continue her attempt to do so and would call back later that night. She never called back. Early the following morning, the second

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day of trial, an attorney in Miami, Florida, called Petitioner's attorney's office and indicated that Petitioner could be present the next morning, April 2 (App. p. 6). Later that same morning the Court met in Chambers with Counsel. Petitioner's attorney reported the telephone calls and moved for a one-day continuance (App. p. 6). The Court denied the motion on the grounds, among others, that there was still no indication from Petitioner that he could be present and that the two phone calls indicating that he might be had originated from Petitioner's mother in Miami, Florida.

Petitioner's father, apparently at the instigation of the mother, had arrived in New York on the evening of April 1. Petitioner and his father flew to Arizona .

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the next day, arriving late in the evening (App. p. 15). On the following morning, April 3, Petitioner went to his attorney's office and, together, they turned Petitioner in to the authorities who arrested him on a bench warrant which had been issued previously.

The question of whether Petitioner's absence from his trial was voluntary was fully litigated on May 4, 1970, when the trial court held a hearing on whether Petitioner should be punished for contempt by reason of his failure to appear for trial. Petitioner was represented at this hearing by his present attorney. Petitioner and his court-appointed attorney testified fully. At the conclusion of this hearing, Petitioner asked to make a statement to the Court and concluded

his statement by saying:

> Of course, the Court has no way of knowing, actually, how I really did feel, but I tell the Court that I had--that I had no intentions of not coming.

The Court replied to this statement as follows:

> I might say this, Mr. Tacon, the Court is impressed not a bit by your expressed intentions in this case. I don't believe any of them, and I just can't see any justification or excuse for your conduct. That's all.
>
> * * * * * *
>
> The record may show the filing in open court of Application for Certificate of Probable Cause, Notice of Appeal, and Application for Admission to Bail. All other matters are taken under advisement. (App. p. 50.)

Petitioner did not file a Motion for

a New Trial. On appeal, however, he raised the issue of whether his absence from trial amounted to a voluntary waiver of his right to be present. The Arizona Supreme Court held as follows:

> The defendant's own testimony clearly shows he was aware that the trial was set for March 31st and that the trial would proceed without him if he failed to appear. The trial court was of the opinion that Tacon's absence was voluntary and there is substantial evidence in the record to support that opinion. Under these circumstances, we hold that Tacon's absence from his trial constituted a knowing and intelligent waiver of his right to be present at the trial and that the trial court, therefore, did not err in proceeding with the trial in his absence. (App. p. 58.)

## ARGUMENT

### I

### CAN A DEFENDANT WHO IS CHARGED WITH A NON-CAPITAL FELONY AND WHO HAS WAIVED HIS RIGHT TO BE PRESENT AT TRIAL BE TRIED IN ABSENTIA CONSTITUTIONALLY?

The real issue under this question is whether Arizona's rule permitting trial in absentia differs constitutionally from the Federal rule. In his beginning, however, Petitioner seems to be making the argument that trial in absentia is always constitutionally infirm. He begins his argument on this question with the statement that Arizona law permits trial in absentia, but that this Court has held that the right of the accused to be present at trial cannot be waived either by himself or by counsel. Incredibly, in

support of this statement, he cites Lewis v. U.S., 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), and Diaz v. U.S., 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), while apparently ignoring this Court's statement in Illinois v. Allen (also cited by Petitioner), 397 U.S. 337, 342, 90 S.Ct. 1057, 1060, 25 L. Ed. 2d 353, 358 (1970), that:

> The broad dicta in Hopt v. Utah, supra, and Lewis v. U.S. [citations omitted], that a trial can never continue in a defendant's absence have been expressly rejected. Diaz v. U.S. [citations omitted].

It is apparent from an examination of the cases of this Court that a defendant charged with a non-capital felony can, contrary to the assertion of Petitioner,

be tried in absentia. In Diaz v. U.S., supra, this Court enunciated the rule as follows:

> But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. (223 U.S. 455, 32 S.Ct. 254, 56 L.Ed. 505 [1912].)

The reason for this Rule was well stated in Falk v. U.S., 15 D.C. App. 446 (1899), which was also quoted as supporting the rule in Diaz, supra, and was reaffirmed by Mr. Justice Brennan in his

concurring opinion in Illinois v. Allen, supra,:

> It does not seem to us to be consonant with the dictates of common sense that an accused person....should be at liberty, whenever he pleased, to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. ... ...This would be a travesty of justice which could not be tolerated.....[W]e do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty. (Emphasis supplied by underlining.)

Indeed, the rule is as stated by this Court in Illinois v. Allen, supra,:

> We accept instead the

> statement of Mr. Justice Cardozo who, speaking for the Court in Snyder v. Massachusetts, 291 US 97, 106, 78 L Ed 674, 678, 54 S Ct 330, 90 ALR 575 (1934), said: 'No doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct.'

Thus, the rule that where a defendant who is present at the start of his trial and voluntarily absents himself therefrom may thereafter be tried in absentia has received the judicial sanction of this Court not only by these decisions, but also by the promulgation by this Court of Rule 43, Federal Rules of Criminal Procedure. This construction has also been expressly adopted in the 1st, 2nd, 4th, 6th, and 8th Circuits: U.S. v. Tremont, 438 F.2d 1202 (1st Cir. 1971); U.S. v. Bando, 244 F.2d 833, cert.

denied, 355 U.S. 844, 78 S.Ct. 67, 2 L.Ed. 2d 53 (2nd Cir. 1957); Parker v. U.S., 184 F.2d 488 (4th Cir. 1950); State of Arizona v. Hunt, 408 F.2d 1086, cert. denied, 396 U.S. 845, 90 S.Ct. 81, 24 L.Ed. 2d 95 (6th Cir. 1969); Glouser v. U.S., 296 F. 2d 853, cert. denied, 369 U.S. 825, 82 S. Ct. 840, 7 L.Ed. 2 d 789 (8th Cir. 1961).

The same proposition is adopted in the following state jurisdictions: Arizona - State v. Cumbo, 96 Ariz. 835, 396 P.2d 11 (1964); Arkansas - Nelson v. State, 190 Ark. 1027, 82 SW 2d 519 (1935); California - People v. White, 95 Cal. Rptr. 576, 18 CA 2d 44 (1971); Colorado - Van Houten v. People, 22 Colo 53, 43 P. 137 (1895); Florida - Henry v. State, 94 Fla. 785, 114 So. 523 (1927); Georgia - Miller v. State, 226 Ga. 730, 179 SE.2d

265 (1970); Illinois - People v. Trice, 127 Ill A.2d 310, 262 NE.2d 276 (1970); Kansas - Cox v. Hand, 185 Kans. 780, 347 P.2d 265 (1959), cert. denied, 363 U.S. 822, 80 S.Ct. 1265, 4 L.Ed.2d 1520 (1960); Kentucky - McKinney v. Commonwealth, 474 SW.2d 384 (1971); Louisiana - State v. Benoit, 219 La. 536, 53 So.2d 404 (1951); Massachusetts - Commonwealth v. Flemmi, 71 AS 1909, 277 NE.2d 523 (1971); Michigan - People v. Gant, 363 Mich 407, 109 NW.2d 873 (1961); Minnesota - State ex rel Shetsky v. Utecht, 228 Minn 44, 36 NW.2d 126 (1949); Mississippi - Stokes v. State, 128 So. 2d 341 (1961); Missouri - State v. Drope, 462 SW.2d 677 (1971); New York - People v. Colon, 322 NY Sup. 2d 907 (1971); North Carolina - State v. Turner, 182 SE. 2d 244 (1971); State v. Stockton, 185 SE.

2d 459 (1971); North Dakota - State v. Thompson, 219 NW 218 (1928); Ohio - Wilson v. State, 2 Ohio State 319 (1853); Oklahoma - Cole v. State, 35 OCR 50, 248 P. 347 (1926); Pennsylvania - Commonwealth v. Diehl, 378 Pa. 214, 107 A.2d 543 (1954); South Carolina - State v. Bramlett, 114 SC 389, 103 SE 755 (1920); Texas - Johnston v. State, 477 SW.2d 891 (1972); West Virginia - State v. Blankenship, 137 W.Va. 1, 69 SE2d 398 (1952); Wisconsin - Stoddard v. State, 132 Wisc. 520, 112 NW 453 (1907).

Concededly, most of the above-listed jurisdictions are construing either Rule 43 of the Federal Rules of Criminal Procedure or comparable State rules or statutes, and here we reach the real crux of the argument. Petitioner attempts to

distinguish Rule 231 of the Arizona Rules of Criminal Procedure by noting that FRCP 43 requires that a defendant be present at the commencement of his trial whereas ARCP 231 has no such requirement. He would allow the waiver of presence at trial, but only after trial has commenced. He asserts a constitutional difference between waiver of presence before trial and waiver of presence after trial has commenced.

The Sixth Circuit has had occasion to rule on this point in State of Arizona v. Hunt, supra. It was there stated:

> We find little difference in substance between that Rule [43 FRCP] and the attacked Arizona Rule. .... The District Court found inapplicable Diaz v. United States [citations omitted], and Pearson v. United States, 117 U.S. App.D.C. 52, 325 F.

> 2d 625 (1963). We find them in point upon the principle that voluntary absence from the trial forecloses later claim of constitutional deprivation. (408 F.2d App. 1095, 1096.) (Emphasis supplied by underlining.)

Putting aside the consideration that under such decisions as Coleman v. Alabama, 399 U.S. 1 (1970); U.S. v. Wade, 388 US 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 US 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); and Stovall v. Denno, 388 US 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); it could well be argued that Petitioner's "trial" had already begun, trial in absentia of a felony defendant voluntarily absent throughout all trial proceedings other than arraignment and sentencing does not differ in its constitutional

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import from Federal Criminal Rule 43. The constitutional rights involved are the right of confrontation, the right to assist in one's own defense, and the right of cross-examination. All of these may be waived. The State does not question Petitioner's right to be present at his trial, per Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 8 L.Ed. 674 (1934); nor his right to cross-examination, per Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed. 2d 923 (1965); nor the right of confrontation, per Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968). However, voluntarily absenting oneself will have no different effect on these constitutional rights and their exercise whether the absence is after trial commences or after one's

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arraignment, thereby making the practical import of Arizona Rule 231 and Federal Rule 43 the same.

Petitioner comments, in passing, that it is ironic that Arizona would not permit the trial of a physically present but mentally incompetent defendant, but recognizes no restraint in trying a defendant who is physically absent. This comment ignores, of course, the fact that the mental incompetent is mentally not present through no fault of his own, and whether or not Petitioner was absent volitionally and culpably is one of the issues he is attempting to litigate in this Court.

Petitioner also asserts that since the State had the power to seek the extradition of Petitioner, it should have

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elected this remedy rather than the remedy of trial in absentia. We should note parenthetically here that in connection with this power of extradition, Arizona also had the power to see that Petitioner was additionally charged as a fugitive. Still, this claim of Petitioner's is immaterial in this case because it ignores the fact that the State could have refused to allow Petitioner to go from custody without bond. Moreover, an election to exercise one alternative "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, supra, 291 U.S. at 105. Finally, Petitioner's claim that extra-

dition must be used would allow ".....a defendant to profit from his own wrong in this way." Illinois v. Allen, supra, 397 U.S. at 345.

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ARGUMENTS

II and IV

DID THE STATE COURT HOLD AN ADEQUATE HEARING AND MAKE A PROPER FINDING ON THE ISSUE OF THE VOLUNTARINESS OF PETITIONER'S WAIVER OF HIS RIGHT TO BE PRESENT AT TRIAL?

At some points in this argument, Petitioner seems to imply that a trial may not be commenced until there is first a hearing to determine if his absence is voluntary, knowing and intelligent. Although conceivably this could be done in the case of a defendant who announced his intentions beforehand, it is a manifest absurdity in the case, as at bar, where the defendant simply never shows up for his trial. Notwithstanding this, the record shows that before beginning trial the trial court did conduct such a

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hearing as was possible under the circumstances. He closely interrogated defendant's counsel as to his communications with the defendant. (At this point in the proceedings, it must be remembered that the trial court had nothing before it to indicate that defendant had not received the letter of March 18 or the telegram of March 24.) The Court had the reports of the telephone conversations between Petitioner and his counsel of March 30, 1970, where Petitioner had told his counsel that he didn't have funds sufficient for transportation, a clear indication that he was not going to be present at trial (App. p. 4-5). The Court further had Petitioner's attorney check with his office and throughout the Courthouse to determine if Petitioner were

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present (App. p. 6). At the conclusion of all this, the Court stated:

> It was reported that Mr. Whitney was unable to locate the defendant and that it is the order of the Court, based on the foregoing matter, that the matter proceed to trial in the absence of the defendant (App. p. 6).

It is thus obvious that the Court conducted as much of and as thorough a hearing as was possible under the circumstances. To require that the Court, at this point, in place of its order that trial commence, should have made an express finding of voluntary absence is to enshrine form over substance. Petitioner states that waiver cannot be presumed from a silent record, under Carnley v. Cochran, 369 U.S. 506 (1962), and other cited cases. Conceded. But the record

is far from silent, and we are not dealing here with a defendant who has appeared and requested permission to absent himself but with a defendant who never appeared.

Petitioner slides by the facts of the first hearing and goes to the second, or contempt, hearing. He has many complaints of this hearing, none of which are valid. First he complains chat the burden of proving that one's absence from trial was not voluntary is "an onerous one indeed." But it was only "onerous" in light of the facts that Petitioner, himself, had created. Petitioner, through his wife, had himself released without bond. Petitioner, on his own, removed himself to a far distant corner of the country. Had he been presenting to the

Court an emergency hospitalization or involuntary incarceration somewhere, we doubt if the burden would have been so difficult. Nor is it improper in this case that the burden of proving the involuntariness of his absence be on Petitioner. What is being litigated here is not a State action, such as the extraction of a confession or the failure to provide an attorney, but the positive action of the Petitioner in absenting himself or absconding. Thus, the burden is properly upon the one who asserts that his action was involuntary.

He also attacks the findings of the Court by stating that as soon as he obtained the funds necessary to finance a trip, he did, in fact, fly to Arizona. He states that this is perhaps the best



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vidence of Petitioner's intention not to
aive his right to be present at trial.
e overlooks, however, the fact that the
rial Judge, by Petitioner's own state-
ents, had evidence that he did not leave
ew York for Arizona until the appearance
rom Spain of his father. The Court also
ad the fact, again from Petitioner's own
tatements, that Petitioner was employed
though perhaps not optimally) and had 24
ays' notice of the date of trial to get
o Arizona, during which time he under-
tood that if he did not appear trial
ould proceed without him. The Court
ould well have concluded from this evi-
ence that Petitioner's intent to return
o Arizona never materialized until his
ather appeared with the parental author-
ty to inspire the trip so that the trouble



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Petitioner was in did not deepen. These comments, however, illustrate the inappropriateness of deciding these issues in the setting of this case as presented to this Court.

Petitioner states that no "procedure for a post trial hearing on such matters is provided for by Arizona law." Such is not the case. Rule 311, Arizona Rules of Criminal Procedure A.R.S. 17, provides as follows:

> RULE 311. GROUNDS FOR NEW TRIAL INVOLVING PREJUDICE OF SUBSTANTIAL RIGHTS OF DEFENDANT
>
> A. The court shall grant a new trial if any of the following grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:
>
> 1. That the defendant was not present at any

> proceeding where his presence is required under these Rules.
>
> . . . . .
>
> B. The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial.

Moreover, the Arizona Supreme Court in State v. Taylor, 104 Ariz. 264, 266, 451 P.2d 312 (1969), has stated:

> A trial court which commences a trial in the absence of a defendant does so with the knowledge that such absence may later be shown to be involuntary.

The Petitioner did not file a Motion for a New Trial and his failure to do so is unexplained. The rule in Arizona of ancient standing is that where the trial



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court is not given a chance to correct its own error, the Appellate Court will not consider the error on appeal, Sutherland v. Putnam, 3 Ariz. 182, 24 P. 320 (1890); Pickthall v. Steinfeld, 12 Ariz. 230, 100 P. 779 (1909); Taylor v. American National Insurance Co., 1 Ariz. App. 574, 405 P.2d 826 (1965). Notwithstanding this, the issue of whether Petitioner had voluntarily absented himself from trial was presented to the Arizona Supreme Court on appeal. That Court reviewed all of the record, including the extensive record made at the contempt hearing, and concluded that there was more than sufficient evidence to uphold the actions of the trial court. Perhaps the trial court should have made a more explicit finding than its statement that



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it was not a bit impressed by Petitioner's expressed intentions and could see no justification or excuse for his conduct (App. p. 50). But the fact remains that a voluminous hearing covering all of the evidence necessary to the determination of the voluntariness issue was held. If the trial court's conclusion cannot be said to be a finding on this issue, the Arizona Supreme Court's resolution of it, on the merits on appeal, can. It would be inappropriate for this Court, on Certiorari, on this record, to disturb those factual findings.

## ARGUMENT

### III

WHEN A DEFENDANT WHO HAS BEEN RELEASED FROM CUSTODY WITHOUT BOND VOLUNTARILY ABSENTS HIMSELF FROM THE JURISDICTION OF THE STATE AND LATER FAILS TO APPEAR FOR TRIAL, KNOWING THAT THE TRIAL WOULD PROCEED IN HIS ABSENCE, IS HIS LATER UNSUBSTANTIATED CLAIM OF BEING TOO IMPOVERISHED TO AFFORD TRAVEL EXPENSES SUFFICIENT TO UPSET THE STATE COURT'S FINDING OF VOLUNTARY ABSENCE AND THUS VOLUNTARY WAIVER OF HIS RIGHT TO BE PRESENT AT TRIAL?

Petitioner has asserted in this case the "red herring" of poverty, no doubt in awareness of the diligence of this Court in protecting the rights of the poor of access to meaningful justice. What Petitioner has overlooked, however, is that the holdings of this Court, in



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cases such as Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); and Boddie v. Connecticut, 401 U.S. 371. 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); have all been to the point that no one should be deprived of an essential ingredient of the justice process because he is poor. Thus, counsel at trial or a transcript on appeal, to take two examples, are essential ingredients of the machinery of justice; and, if they are available to the affluent, they must likewise be available, as this Court has so rightly held, to the poor. But transportation to the site of the trial is not now and never has been an ingredient of the justice system, nor has it ever been supplied to the affluent by the



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State. Indeed, Petitioner's complaint here is highly ironic. He asserts a need for travel expenses because the State had beneficently agreed to release him from custody without bond. The State could have acted as it has always:

> .....The first act of the magistrate is to exact security from the defendant, or, in case of refusal, to incarcerate him. ...It is evident that such (a procedure) is hostile to the poor and favorable only to the rich. The poor man has not always a security to pledge. ..... (1 De Tocqueville, DEMOCRACY IN AMERICA, 55-56 [Bradley edition, 1963].)

Instead, in this case, it moved commendably to remove what many think to be an invidious discrimination (see Pelletier v. U.S., 343 F.2d 322, 323 [D. C. Cir. 1965]), by releasing defendant



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without bond. Defendant now seeks to turn this act against the State by claiming that the State either must now furnish him transportation to the site of the trial or be powerless to try him in the orderly processes and progressions of its Court calendars. If such a claim becomes prevailing law, the inevitable result will be to chill, if not kill, the humane modern tendency to release non-affluent defendants on minimal or no bail. This would be doubly unfortunate at a time when the prevailing legal philosophy is to liberalize policies in such areas. (See Sachs, INDIGENT COURT COSTS AND BAIL: Charge Them to Equal Protection, 27 Maryland Law Review 154 [1967].)

The cases Petitioner relies upon, in his poverty claim, deal with persons too



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poor to afford counsel, to afford Appellate review, to afford a divorce, and so forth. They set forth the proposition that one's indigency should not result in a disadvantage within the judicial process. Transportation to trial is clearly an extra-judicial matter and cannot remotely be tied to the process of the orderly and impartial administration of justice.

In the end, Petitioner's claim can be bottomed only on due process or equal protection. It is generally understood that at the basis of due process of law are two elements: notice to the accused and an opportunity to be heard, Boddie v. Connecticut, supra; Kazubowski v. Kazubowski, 45 Ill.2d 405, 259 NE.2d 282 (1970); Wallace v. State, 224 Ga. 255, 161



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SE.2d 288 (1968); Wasson v. Trowbridge, 382 F.2d 807 (CANY, 1967); MacBeth v. Utah, 332 F. Sup. 1191 (D.C. Utah, 1971). There is no showing here, nor can there be, that the State deprived Petitioner of his opportunity to be heard. And, as pointed out before, Petitioner had at least 24 days' notice.

Nor can Petitioner be supported in his claim by equal protection. It is well settled that the essence of equal protection is that all persons similarly situated be treated alike and that what the State extends to one who is affluent may not be withheld from one who is poor, Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed. 2d 39 (1961); Draper v. Washington, 372 U.S. 487 (1963); and Griffin v. Illinois, supra. Transporta-

tion to trial is not something that the State extends to any person, poor or rich.

Indeed, if Petitioner's contention in this setting should prevail, it would logically result in a requirement that the State provide indigent defendants with free transportation to trial, whether they be cross-town, cross-state, or cross-country.

## SUMMARY OF THE ARGUMENTS

### I

The United States Supreme Court, the United States Courts of Appeals, Federal Rule of Criminal Procedure 43, at least one-half of the States, and Arizona Criminal Rule 231, all hold that a defendant charged with a non-capital felony can be tried in absentia. The trial in absentia of a felony defendant who is voluntarily absent throughout all trial proceedings (other than arraignment and sentencing) does not differ in constitutional import from the situation in which a defendant waives his right to be present after the commencement of trial. The waiver prior to trial of the right to be present at one's trial or the right to confront and cross-examine cannot logically be distin-



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guished from the waiver of these same rights after the trial has begun.

II and IV

There was a proper finding by the Court that Petitioner had voluntarily waived his right to be present at his trial. Before trial a hearing was held to determine whether or not the trial should proceed. The trial court's order that trial proceed as scheduled and its subsequent order denying the Motion for Continuance were the equivalent of a finding of a voluntary waiver by the defendant.

The contempt proceeding after trial, with the defendant present and testifying, was a full evidentiary hearing on the issue of voluntariness. The Court, at the conclusion of this hearing, stated it

was not impressed with Petitioner's "expressed intentions." On review, the Arizona Supreme Court examined the entire hearing as to the merits of the trial court's implicit finding that Petitioner had voluntarily waived his right to be present at trial. With these three separate reviews, each as extensive as was possible at the time it was held (pre-trial, post-trial, and appellate), it is clear that an adequate hearing was held and there was a proper finding of fact as to the voluntary waiver, and that finding should not be disturbed by this Court on Certiorari.

III

Petitioner's unsubstantiated claim of poverty is of no moment in the case at bar. Transportation to trial is a wholly

extra-judicial activity. Petitioner can show no invidious discrimination on the part of Arizona in this regard as Arizona has never provided transportation to or from trial for any criminal defendant, however rich or poor he or she may be. If Petitioner's claim is upheld, it will chill, if not kill, the move toward bail reform.

## CONCLUSION

One charged with a felony may waive his presence at trial. There is no constitutional difference between Arizona's rule, which allows a waiver by non-appearance at the commencement of trial, and the Federal rule, which requires that the defendant be present at the commencement before his voluntary absence from trial will be considered a waiver. There were adequate hearings and substantial evidence to support the trial court's conclusion that Petitioner's absence was a voluntary waiver. Petitioner's claim of poverty is irrelevant, since he himself caused the situation by removing himself from Arizona to New York and since transportation to trial is neither a constitutional right nor an ingredient



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of the justice system supplied by the State to anyone. For these reasons, the Courts below should be affirmed.

Respectfully submitted,

GARY K. NELSON
Attorney General
of Arizona

WILLIAM P. DIXON
Assistant Attorney General

Attorneys for Respondent

AFFIDAVIT

STATE OF ARIZONA )
) ss.
County of Maricopa )

WILLIAM P. DIXON, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the Petitioner in the foregoing case by forwarding two exact copies of Brief of Respondent on Writ of Certiorari to The Supreme Court of Arizona in a sealed envelope, first class postage prepaid, depositing same in the United States mail, addressed to:

Robert J. Hirsh, Esq.
Messing, Hirsh & Franklin, P.C.
509 Transamerica Building
Tucson, Arizona 85701

this 14th day of August, 1972.

William P. Dixon

SUBSCRIBED AND SWORN to before me this 14th day of August, 1972.

Notary Public

My commission expires:
Mar 5 1973

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 71-6060

Anthony Louis Tacon, Petitioner, v. State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[February 21, 1973]

PER CURIAM.

Petitioner, while a soldier in the United States Army stationed at Fort Huachuca, Arizona, was arrested and charged by state authorities with the sale of marihuana in violation of applicable state law. Prior to his trial on this charge the petitioner was discharged from the Army and voluntarily left Arizona for New York. When the trial date was set the petitioner's court-appointed attorney so advised the petitioner and requested him to return to Arizona. Assertedly because he lacked travel funds, the petitioner did not appear in Arizona on the date set for trial. Under these circumstances the trial proceeded without the petitioner's presence, as authorized by state procedure. The jury returned a guilty verdict. After the verdict was rendered the petitioner obtained the necessary travel funds and returned to Arizona in time for his sentencing. He was sentenced to not less than five nor more than five and one-half years in prison. The Arizona Supreme Court affirmed his conviction. 107 Ariz. 353 (1971).

The petition for certiorari in this case presented questions as to constitutional limits on the States' authority to try in absentia a person who has voluntarily left the

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State and is unable, for financial reasons, to return to that State. Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969). The only related issue actually raised below was whether petitioner's conduct amounted to a knowing and intelligent waiver of his right to be present at trial. Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 71-6060

Anthony Louis Tacon,
Petitioner,
*v.*
State of Arizona.

On Writ of Certiorari to the Supreme Court of Arizona.

[February 21, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner, while in the Armed Services, was stationed in Arizona and while there was arrested and charged with the unlawful sale of marihuana. That was on February 24, 1969. His counsel asked for a continuance of the trial until April 22, 1969, which was granted. But no trial date was set at that time, one being subsequently set for March 31, 1970. In the meantime petitioner had been discharged from the Army in New York and gave his attorney his New York address. The attorney sent word by letter on March 3, 1970, that the trial would start March 31 and asked that he return a week early for preparation. Petitioner received that letter March 6 or 7, but had no funds to return. He apparently in good faith tried to raise the money but was not successful. He eventually did succeed and arrived in Arizona April 2. But the trial was over. Petitioner was convicted *in absentia* and sentenced to not less than five years nor more than 5½ years. On appeal the Supreme Court confirmed. 107 Ariz. 353, 355.

Under Rule 231 of Arizona's Rules of Criminal Procedure a trial may be conducted in the defendant's absence "if his absence is voluntary." 107 Ariz. 353. The Arizona Supreme Court held that there had been "a knowing and intelligent waiver of his right to be

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present at the trial." 107 Ariz. 357. The federal rule of "a knowing and intelligent waiver of his right to confrontation and to be present at the trial of his case," *id.*, at 354, was the test applied by the Arizona Supreme Court.

The Sixth Amendment is applicable to the States by reason of the Fourteenth. *Gideon* v. *Wainwright*, 372 U. S. 335; *Pointer* v. *Texas*, 380 U. S. 402, 496; *Washington* v. *Texas*, 388 U. S. 14. The right "to be confronted with the witnesses against" him—the right of confrontation in the popular sense—means a "face-to-face" meeting. As stated in *Illinois* v. *Allen*, 397 U. S. 337, 338. "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of the trial."

It is said by the Court that the broad issue of whether a defendant charged with a felony can ever waive his right to be present at trial is not properly before us, since petitioner neglected to plead the issue in this manner before the state courts. The issue which petitioner did raise in the state courts was whether the evidence in the record was sufficient to show that his absence from trial was voluntary, *i. e.*, that he made a knowing and intelligent waiver of his right to be present. The Court disposes of this "related issue" by holding that it is a factual issue which does not justify the exercise of our jurisdiction. But the question whether a constitutional right has been waived always involves factual matters. "When constitutional rights turn on the resolution of a factual dispute, we are *duty bound to make an independent examination* of the evidence in the record." (*Brookhart* v. *Janis*, 384 U. S. 1, 4, n. 4, emphasis added.)

The question of a knowing and intelligent waiver of this man's federal constitutional right to be present at his trial is far from frivolous. Petitioner was not fleeing the jurisdiction or going into hiding. He knew of the

trial date and was trying to raise the necessary funds to travel west. A second letter dated March 18, sent by his attorney, suggested that a guilty plea to a reduced charge might be acceptable. But due to a mail strike petitioner did not receive that letter until April 1st, when his trial was over. On March 24th petitioner's counsel sent him a telegram stating that trial would proceed March 31st whether petitioner was present or not. But that telegram was never received even by Western Union in New York. On March 30th petitioner called his lawyer, who told him the court would proceed with the trial even though the accused was absent. Petitioner replied that he would attempt to make it. But as noted he did not arrive until April 2d.

On this record one cannot say that petitioner had knowingly and intelligently waived his Sixth Amendment right of confrontation. Heretofore we have never treated the question of waiver cavalierly. We indulge every presumption against the waiver of a constitutional right. We said in a rate case that we "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Commission*, 301 U. S. 292, 307. I would treat a hapless victim of a criminal marihuana charge equally as I would a corporate victim of an incompetent regulatory commission.

When we decide to dismiss this case, we multiply the burdens of the federal court system. The issue of waiver *vel non* of the Sixth Amendment right is ready now for decision. When we dismiss, we in effect tell petitioner first to try state habeas corpus and then federal habeas corpus. When indigents had no counsel, these trials were often pregnant with error, and habeas corpus was the normal remedy. But where the issue is exposed on appeal, it should be resolved then and there. When we fail to take that step here, we ask petitioner and his counsel to exhaust themselves during the next five years

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while they seek a federal determination of their federal right.

The law of waiver that governs here was stated by Mr. Justice Black in an earlier case many years ago. He ruled on waiver of counsel; but there is no difference when it comes to waiver of the right of confrontation. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U. S. 458, 464. This Court later held that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances and likely consequences.*" (*Brady* v. *United States*, 397 U. S. 742, 748, emphasis added; see also *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275; *Patton* v. *United States*, 281, U. S. 276, 312.)

No such showing has been made in the present case. I would reverse the judgment below.